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THE LAWYER-DELEGATES OF THE 1972 MONTANA CONSTITUTIONAL CONVENTION: THEIR INFLUENCE AND IMPORTANCE

Fritz Snyder* and Mae Nan Ellingson**

I. INTRODUCTION

This article highlights the contributions of the lawyer-delegates to the 1972 Montana Constitutional Convention. Twenty-four of the 100 elected delegates were lawyers.¹ In one survey, these 100 delegates were the second most important group of individuals in Montana's twentieth-century history, behind only Mike and Maureen Mansfield.² The 1972 Constitution, the fundamental law of Montana, has withstood many challenges. Most recently, in the November 2010 general election, the proposal for calling another constitutional convention was rejected by a 59–41 percentage vote. In September 2010, the *Montana Law Review* hosted the James R. Browning Symposium, which focused on the Montana Constitution. In light of these two events, it is timely to examine the role of the lawyer-delegates in writing and debating the Constitution.

While it is generally agreed the Constitutional Convention was conducted on a nonpartisan basis, the delegates had to declare a party affiliation or run as Independents during the election. Of the 24 lawyers, 14 were Democrats, nine were Republicans, and one was an Independent.³ Sixteen of the 24 lawyers represented Montana's urban areas, with the other eight hailing from Glendive, Libby, Shelby, Roundup, Miles City, Dillon, Sidney, and Polson.⁴ One lawyer, Mike McKeon, was only 25, six were in

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1. There were only ten lawyers among the 150 legislators in the 2011–2012 Montana Legislature. *2010 Montana Legislative Session: Number of Lawyers in Legislature Jumps to 10*, 36 Mont. Law. 8 (Dec. 2010/Jan. 2011).

2. *One Hundred Most Influential Montanans of the Century*, Missoulian M4 (Oct. 24, 1999).

3. *Montana Constitutional Convention Proceedings* vol. 1, 30–64 (Mont. Legis. & Legis. Council 1972) (available at http://courts.mt.gov/library/montana_laws.mcp) (Delegate Information).

4. *Id.*

their thirties, nine were in their forties, six were in their fifties, and two were in their sixties.⁵

Of the 16 delegates who had previously served in the Montana Legislature, five were lawyers: Cedor Aronow, Ben Berg, James Felt, Marshall Murray, and John Schiltz.⁶ However, almost every lawyer elected to the Convention had performed some public service prior to their election. Franklin Arness of Libby had served as both county attorney and city attorney; Geoffrey Brazier of Helena had served as deputy county attorney; Bruce Brown of Miles City had served as both city attorney and county attorney; Carl Davis of Dillon had served as county attorney and on the State Welfare Board and the Supreme Court Commission on Practice; James Garlington of Missoula had served as city attorney and as a school-board trustee; Leo Graybill of Great Falls had served as Chairman of the Great Falls International Airport Commission; Otto Habedank of Sidney had served on the Montana Constitutional Revision Commission; David Holland of Butte had served as assistant attorney general, city attorney, and chief deputy county attorney; Tom Joyce had served as assistant attorney general and county attorney; Jerome Loendorf of Helena had served as county attorney; and Russell McDonough of Glendive had served as city attorney, county attorney, and Chairman of the City-County Planning Board. In addition to being legislators, both Ben Berg and Marshall Murray were city attorneys. William Swanberg of Great Falls had served as both mayor and city alderman.⁷

After the 100 delegates were sworn in on November 29, 1971, Cedor B. Aronow, lawyer and former legislator, was elected temporary president of the Convention.⁸ After a somewhat lengthy nomination process,⁹ two delegates—both lawyers—were nominated for the president position: Bruce Brown, an Independent from Miles City, and Leo Graybill, a Democrat from Great Falls. After a roll-call vote in which Delegate Graybill received a majority of the votes,¹⁰ Delegate Brown moved that a unanimous ballot be cast for Leo Graybill as President of the Constitutional Convention.¹¹ Delegate Brown's gesture set the tone for the Convention to be conducted on a bipartisan basis from that day forward. In his acceptance speech, President Graybill said:

[W]e are actually representatives of the people of the fine State of Montana, and I hope that we will keep in front of our minds as we go through the

5. *Id.*

6. *Id.*

7. *Id.*

8. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 3, 9 (Verbatim Transcript).

9. *Id.* at vol. 3, 9–16.

10. *Id.* at vol. 3, 16.

11. *Id.*

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Convention, at all times, the fact that all we are doing is fashioning for the public a constitution that we can honorably and honestly present to them.¹²

The substantive work of writing the Constitution was to be performed by ten committees, each devoted to an article of the Constitution.¹³ There were also four procedural committees.¹⁴ The members of each committee, as well as the Chair and Vice-Chair of each, were appointed by the President, after consultation with the three Vice Presidents, and approved by the members of the Convention.¹⁵

In his excellent foreword to the Transcript of Proceedings published in May of 1979, President Graybill described, among other things, his thoughts regarding the appointment of committees.¹⁶ The President made an effort to appoint delegates to the committees in which they expressed a particular interest: 81 delegates were placed on their first choice, 15 received either their second or third choice, and only four received assignments without regard to their three choices.¹⁷ Each committee was weighted between Republicans and Democrats in proportion to their party strength (including special arrangements for Independents). In addition, the President balanced the committees “with strong advocates of the opposing ideological positions likely to be considered by the particular committee.”¹⁸ Committee chairmen were appointed according to party proportions. A member of the opposite party, or whenever possible a member of an opposite faction, was appointed Vice Chairman. President Graybill stated: “The purpose of so carefully weighting the committee membership was to force the conflict over ideas back into the committees. This had the effect of creating the first and perhaps the most significant debate among those most interested in the issue, and at the basic committee level.”¹⁹ Whether by choice or by chance, there was at least one lawyer on every committee.²⁰

Of the procedural committees, two were extremely important in the overall conduct and product of the Convention: the Rules Committee and the Style, Drafting, Transition and Submission Committee. These committees relied heavily on the skill and expertise of lawyers. Marshall Murray of Kalispell, one of the three lawyers assigned to the seven-member Rules Committee, also served as Chair.²¹ Marshall Murray’s experience as a leg-

12. *Id.*

13. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 1, 12 (Convention Rules).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 1, 12 (Convention Rules).

20. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 1, 22–23 (Delegate Information).

21. *Id.* at vol. 1, 21–22.

islator made him the perfect choice for this committee, which established the rules by which the Convention would operate. Thomas Ask and Thomas Joyce were the other lawyer-members.²² Three lawyers served on the 11-member Bill of Rights Committee with one, Wade Dahood, serving as its Chair. Four lawyers served on the nine-member Judiciary Committee, with one, David Holland, serving as its Chair and another, Ben Berg, serving as Vice Chair.²³ Lastly, two lawyers served on the Agriculture and Natural Resources Committee.²⁴

As President, Delegate Graybill presided over the Convention's daily sessions, making things run smoothly and wrapping everything up by the March 24, 1972 deadline. Graybill did three things to keep things moving: (1) he asked the delegates to stop echoing their support when someone else had said the same thing; (2) he asked the delegates to avoid humorous remarks; and (3) he asked "that delegates not quibble over possible errors in grammar and punctuation caused by amending measures from the floor" and to let the Style and Drafting Committee handle those details.²⁵

Nowhere was the technical skill of lawyers more important than in the Style, Drafting, Transmission, and Submission Committee. Six of the 11 committee members were lawyers, including the Chairman, Billings lawyer John M. Schiltz.²⁶ Two lawyers, Diana Dowling and Sandra Muckelston, staffed the Committee.²⁷ Additionally, University of Montana Law School professor and lawyer Gardner Cromwell served as its consultant.²⁸ After each article was approved by the Committee of the Whole, the Style Committee was responsible for making changes to the article's style, form, and grammar²⁹ so the final document would be clear, concise, and unambiguous. Upon completion, each revised article was presented to the Committee of the Whole for consideration, debate, and amendment, and then to the full Convention for final approval.³⁰

The lawyers at the Convention were influential for many reasons: their knowledge of the law, their familiarity with jurisprudence, their ability to debate and persuade, and their eloquence. Lawyer-Delegate James Garlington had all of these attributes. Early in the Convention, he declared:

22. *Id.* at vol. 1, 21.

23. *Id.* at vol. 1, 22.

24. *Id.*

25. Hubert G. White, *President Wants Brevity at Con-Con*, Associated Press (1972) (copy on file with author Fritz Snyder).

26. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 21 (Delegate Information).

27. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 69 (Convention Staff).

28. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 21 (Delegate Information).

29. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 15 (Convention Rules).

30. *Id.*

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I have been seeking . . . to establish some principles by which my voting . . . could be guided. . . . [The Constitution] would have to assure to the individuals in Montana three freedoms. First, his personal freedoms as we see them in the time-honored Bill of Rights. And second is political freedom meaning his right to vote, to be a candidate, to express his opinions and to know what his government is doing to him and with him. And, third, his future freedoms which, to me, mean his right to try a new system, to expel a bad system, to meet a new problem with a new solution, and to explore constantly the ways and means of living better with government.³¹

Delegate Garlington's remarks were an eloquent response to the comments of then-Governor Forrest Anderson, himself a lawyer and former Attorney General who, in addressing the organizational meeting of the Constitutional Convention on November 29, 1971, stated:

Montana's present Constitution is an expression of the distrust in government that was prevalent when it was written in 1889. It imposes strict limitations on the exercise of the powers of government—legislative, executive and judicial. It is burdened with accumulated statutory detail. And it restricts and confuses the capability of state government to respond to the rapidly changing problems of modern society. I do not believe, however, that the entire Constitution should be stricken, because there are sections which are enduring statements of the rights of individuals and precise definitions of the responsibilities of state government. I believe the revision of the Montana Constitution must accomplish four essential objectives: It must establish the structures and responsibilities of state and local government. It must guarantee the rights of the individual in this state. It must free state government from the strictures that shackle us to the past. And it must allow us to move freely into the future.

* * *

Like the national prototype, our Constitution must not include extraneous statutory provisions that are properly within the jurisdiction of the Legislature. And like the national prototype, our Constitution must be a statement of your faith and the belief that good and decent men and women will govern this state in the coming years. You should not be afraid to include new and progressive ideas in the Constitution. Passage of the referendum calling for this Constitution, executive reorganization, and the nineteen-year old vote are proof that the people of Montana recognize the need for change. And if a proposal is good it will be approved by the people.³²

Governor Anderson's vision for the 1972 Constitution was generally accepted by all of the delegates as their collective task.

The entire Constitution, including the Preamble, reflects the substantial contributions of the lawyer delegates: the idealism of some and the pragmatism of others. Aside from the Style, Drafting, Transition, and Submission Committee, lawyer-delegate participation in the floor debates, conducted as

31. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 3, 582–583 (Verbatim Transcript).

32. *Id.* at vol. 3, 3.

“Committee of the Whole” proceedings, is most notable in the discussions of Article II—Declaration of Rights, Article VII—the Judiciary, and Article IX—Environment and Natural Resources. This article will focus on the lawyers’ participation in the discussion and debate on several of the most significant provisions of those articles.

II. PREAMBLE

Lawyer-Delegate Bob Campbell, perhaps the most idealistic of the lawyer-delegates, and Delegate Mae Nan Robinson introduced and sponsored Delegate Proposal 59, a proposed Preamble to the Constitution:

We, the People of Montana, instilled with the Spirit of our Creator, gathering our strength from the grandeur of our mountains and the richness of our rolling grasslands, with a reverence for the quiet beauty of our state, [w]ith the desire to live in Peace, in order to improve the quality of life and equality of opportunity for this and succeeding generations, do hereby ordain and establish this Constitution.³³

The proposal was referred to the Bill of Rights Committee.³⁴ The most notable substantive change made to the proposal was replacing “Spirit of our Creator” with “God.” The Committee’s Proposal noted:

Because of the concern of those in the convention and the state that not mentioning “God” specifically would be unacceptable[,] the committee voted unanimously to retain Him in the Preamble. Although the committee preferred the term . . . “Spirit of our Creator,” it did not believe the emotional response raised would justify the change.³⁵

The Preamble’s final version is as follows:

We the People of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.³⁶

This beautifully written, quietly poetic Preamble states four aspirations: “an attachment to the land; a guarantee of freedom . . . ; a commitment to continue striving toward an improved quality of life; and the promise of equality of opportunity.”³⁷ It passed by a vote of 91–1.³⁸

33. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 159 (Delegate Proposals).

34. *Id.*

35. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 625 (Committee Proposals).

36. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 1036 (Reports of Committee on Style, Drafting, Transition, and Submission).

37. Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 26 (Greenwood Press 2001).

38. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 7, 2627 (Verbatim Transcript).

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III. ARTICLE II: DECLARATION OF RIGHTS

Three lawyers served on the all-important Bill of Rights Committee: Wade Dahood, Bob Campbell, and Marshall Murray.³⁹ Delegate Dahood, a successful trial lawyer from Anaconda, was the Chairman.⁴⁰ In presenting the Bill of Rights Committee Report, he and Vice-Chairman Chet Blaylock urged the delegates to note “the guidelines and protections for the exercise of liberty in a free society come not from government but from the people who create that government.”⁴¹ They added that the Bill of Rights Committee attempted to ensure “a more responsible government that is constitutionally commanded never to forget that government is created solely for the welfare of the people.”⁴²

In explaining certain provisions of the proposed Bill of Rights, Delegate Dahood made the following observation:

[C]onstitutions are based on the premise that they are presumed to be self-executing, particularly within the Bill of Rights. If the language appears to be prohibitory and mandatory . . . then in that event, the courts interpreting the particular section are bound by that particular presumption and they must assume, in that situation, that it is self-executing.⁴³

Whether a provision was “self-executing” or whether legislative action would be required to implement or effectuate a right became a crucial issue in the discussion of several constitutional provisions and subsequently has been litigated in Montana’s courts.⁴⁴

The second lawyer on the Bill of Rights Committee was Delegate Marshall Murray of Kalispell, also a trial lawyer.⁴⁵ Delegate Murray presented a significant portion of the Bill of Rights Committee’s Proposal during the

39. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 22 (Substantive Committees).

40. *Id.*

41. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 619 (Committee Proposals).

42. *Id.*

43. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1644 (Verbatim Transcript).

44. See e.g. John L. Horwich, *Montana’s Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion*, 57 Mont. L. Rev. 323 (1996); *Friends of the Wild Swan v. Dept. of Nat. Resources*, 127 P.3d 394, 399 (Mont. 2005) (The strict accountability provision of the Montana Constitution, which ensures strict accountability of all revenue received and money spent by the state and local government entities is not self-executing. Mont. Const. art. 8, § 12.); *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 261 (Mont. 2005) (The public-schools clause of the Montana Constitution constitutes a directive to the Legislature and is thus not self-executing. Mont. Const. art. 10, § 1(3).); *Emery v. State*, 580 P.2d 445, 450 (Montana constitutional provision denying suffrage to incarcerated felons is mandatory and self-executing. Mont. Const. art. 4, § 2.).

45. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 22 (Delegate Information).

Committee of the Whole debate, explaining the legal significance of many of the provisions and engaging fully in the debate.⁴⁶

Delegate Campbell, the third lawyer-member of the Bill of Rights Committee, was one of the chief advocates of expanding the individual and collective rights included in the Constitution. He was the chief sponsor and proponent of several new provisions, including the freedom of expression, right to privacy, 18-year-old adulthood, restoration of rights of the convicted, protection against the exercise of eminent domain, and the right to a clean and healthful environment.⁴⁷

Article II includes 35 basic guarantees, many of which deal with the private rights and the public rights of the individual and many of which deal with equal protection of the laws and due process.⁴⁸ Seventeen of these guarantees or rights have no parallel in the Bill of Rights of the U.S. Constitution.⁴⁹ The Montana Constitution's Declaration of Rights contains four rights that emphasize the central role of the individual in government: every person has the right to participate in government, the right to examine government documents and observe government deliberations, the right of individual privacy, and the right to sue governmental entities.⁵⁰ What made this Declaration of Rights so unique was its expansion of individual and collective rights, many of which were included at the behest of lawyers on the Bill of Rights Committee, which this article will note.

A. Article II, § 4: Individual Dignity

At the time the Convention convened, the Equal Rights Amendment to the United States Constitution had not been adopted (and in fact never was adopted).⁵¹ Consequently, it was a priority for many of the delegates that an equal-rights provision be included in the Montana Constitution. Five delegates submitted proposals for an equal-rights provision which resulted in Article II, § 4.⁵²

As unanimously proposed by the Committee, Article II § 4 read:

The dignity of the human being is inviolable. No person shall be denied the equal protection of the law, nor be discriminated against in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or

46. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1728–1729, 1753–1754, 1760–1763, 1790 (Verbatim Transcript).

47. Interview with Bob Campbell, Delegate to Mont. 1972 Const. Conv. (June 29, 2010).

48. See Elison & Snyder, *supra* n. 37, at 17–19.

49. *Id.* at 20.

50. Elison & Snyder, *supra* n. 37, at 20.

51. *Encyclopedia of Civil Rights in America* vol. 2, 345 (David Bradley & Shelley Fisher Fishkin, eds., Sharpe Reference 1998).

52. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 627–628 (Committee Proposals).

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condition, or political or religious ideas, by any person, firm, corporation, or institution; or by the state, its agencies or subdivision.⁵³

The Committee's comments emphasized: "This provision . . . is aimed at prohibiting private as well as public discriminations in civil and political rights."⁵⁴ The Committee proposal also noted the need to include sex in any equal-protection or freedom-from-discrimination provisions. The Committee felt that such inclusion was "eminently proper" and saw no reason for the State to wait for the adoption of the federal Equal Rights Amendment.⁵⁵

During the Committee of the Whole discussion, the proper scope of an equal-rights amendment was vigorously discussed. Lawyer-Delegate Habedank moved to delete the words "by any person, firm, corporation or institution."⁵⁶ His concern was that this section could be construed to prohibit organizations from limiting their membership. He stated: "It can cause me, as an individual, to have to associate with people that I choose not to associate with."⁵⁷

Habedank's proposed amendment would have limited the protection of § 4 to state discrimination only. Lawyer-Delegate Dahood responded:

I can appreciate Delegate Habedank's concern, because I think that concerned us all There is no intent within this particular section to do anything other than to remove the apparent type of discrimination that all of us object to with respect to employment, to rental practices, to actual associationship in matters that are public or matters that tend to be somewhat quasi-public. . . . The intent of Section 4 is simply to provide that every individual in the State of Montana, as a citizen of this state, may pursue his inalienable rights without having any shadows cast upon his dignity through unwarranted discrimination.⁵⁸

Lawyer-Delegate Habedank's motion was defeated by a vote of 13–76.⁵⁹

53. *Id.*

54. *Id.*

55. *Id.*

56. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 5, 1642 (Verbatim Transcript).

57. *Id.* at vol. 5, 1643.

58. *Id.* In an article about Montana's dignity clause, Tia Rikel Robbin has noted that Delegate Dahood's interpretation of this section would have restricted the application of the private-action language "to employment, to rental practices, to actual [association] in matters that are public or matters that tend to be somewhat quasi-public." (Section 4 of Article II is titled "Individual Dignity" and its first sentence states: "The dignity of the human being is inviolable." This has come to be known as the "dignity clause.") Robbin points out that if the application of this section were limited in that manner, the protection provided by the clause would have ensured the inviolability of an individual's dignity only within public or quasi-public parameters. According to Robbin, "Outside those parameters, anyone could discriminate." Tia Rikel Robbin, Student Author, *Untouched Protection from Discrimination: Private Action in Montana's Individual Dignity Clause*, 51 Mont. L. Rev. 553, 560, 565 (1990).

59. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 5, 1646 (Verbatim Transcript).

Continuing the conversation, Lawyer-Delegate Loendorf asked if anything after the words “equal protection of the law” was necessary, suggesting the later protections were subsumed in the first sentence.⁶⁰

Lawyer-Delegate Dahood seemed to agree but noted: “[P]erhaps sometimes the sermon that can be given by constitution, as well as the right, becomes necessary. And I think it takes that type of language to convey the intent of the committee.”⁶¹

Lawyer-Delegate Dahood also sought to assure Delegate Robinson, who questioned whether the provision was self-executing, by stating: “[C]onstitutions are based on the premise that they are presumed to be self-executing, particularly within the Bill of Rights.”⁶²

The delegates unanimously approved the individual dignity clause as proposed by the Committee.⁶³

B. Article II, § 8: Right of Participation

At the time of the Convention, the proceedings of the Montana legislature were neither accountable nor accessible. Roll-call votes were a rarity and committee meetings were often scheduled on a moment’s notice. With Common Cause and the League of Women Voters demanding the Constitution include so-called “Sunshine Provisions,” the Bill of Rights Committee proposed a new right of participation in government. The original proposal read: “The public shall have the right to expect governmental agencies to afford every feasible opportunity for citizen participation in the operation of the government prior to the final decision.”⁶⁴

The Committee’s comments explain the rationale behind the new constitutional protection:

The provision is in [p]art a Constitutional Sermon designed to serve notice to agencies of government that citizens of the state will expect to participate in agency decisions prior to the time the agency makes up its mind. In part, it is also a commitment at the level of fundamental law to such structures, rules and procedures that maximize the access of citizens to the decision-making institutions of state government.⁶⁵

There was considerable debate in the Committee of the Whole among Lawyer-Delegates Dahood, Berg, Davis, Habedank, Garlington, Joyce, and McKeon as to the meaning and application of almost every word and phrase

60. *Id.*

61. *Id.* at vol. 5, 1643–1644.

62. *Id.* at vol. 5, 1644.

63. *Id.* at vol. 5, 1642.

64. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 621 (Committee Proposals); *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1651 (Verbatim Transcript).

65. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 630 (Committee Proposals).

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of the proposed Right of Participation section, including “governmental agencies,” “government,” “every feasible,” “opportunity,” “participation,” and “operation.”⁶⁶ Fairly early in the debate, Delegate Davis provided some comfort to delegates by successfully substituting the word “reasonable” for “every feasible.”⁶⁷ Delegate Garlington questioned whether a Right of Participation even belonged in the Constitution and worried that a vague provision might do more to instigate lawsuits than to open government to the people.⁶⁸

Whether granting a “right to expect” to participate in government granted a right at all became an especially contentious topic. Delegate Harbaugh, although not a lawyer, raised a concern about the meaning of “a right to expect.”⁶⁹ He proposed the section be amended to state: “Governmental agencies shall afford reasonable opportunity” for participation.⁷⁰

Before Delegate Harbaugh’s motion could be voted on, however, Lawyer-Delegate Joyce, still feeling the section was too ambiguous, made a motion to strike § 8 in its entirety. He stated:

It seems to me that however laudatory the language may be, that when we’re writing a Bill of Rights we ought to give people rights or not rights. But to say they have a right to expect something gives them no right at all And on the whole, I think that it will do more harm than good”⁷¹

There was strong opposition to Mr. Joyce’s motion. Lawyer-Delegate McKeon responded: “[I]f a provision such as this can bring the government closer to the people, if a provision such as this can give the people more access to the government, then . . . it is most vital that we accept this provision.”⁷²

But Lawyer-Delegate Garlington added a word of caution, suggesting that the delegates should not take the right to participate too far:

I certainly agree that we are dealing here with ideals; and it would be a great thing if we could operate on the basis of idealism in the participation in government. It has often been said here that the courts are the ones who seem to louse all of this up and to find fault with things. But I want you all to remember that nothing comes to court except when it is brought there by an aggrieved citizen. . . . Now, one thing you have to remember always is that constitutional power is far greater than any other power; and sometimes I kind of fear that we are getting a little intoxicated with the constitutional power

66. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1651–1665 (Verbatim Transcript).

67. *Id.* at vol. 5, 1653.

68. *Id.*

69. *Id.* at vol. 5, 1655.

70. *Id.*

71. *Id.* at vol. 5, 1657.

72. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1658 (Verbatim Transcript).

that we feel here, and this is why I am always counseling caution in these things, because these are irretrievable and unmanageable. They are rigid and firm. . . . And I caution you again that we should make sure that the language we write and we put in here is so clear that these things are not suddenly thrust upon the public in a way that creates disruption and dissatisfaction with government instead of pleasure with it.⁷³

Lawyer-Delegate Holland echoed some of Delegate Garlington's concerns and introduced another concern about the potential effect of an ambiguously framed right:

All of this is—language is so loose that it can lead, as Mr. Garlington has pointed out, it can lead to nothing but lawsuits. . . . I suggest that if the intent is as Mr. Dahood says, then I can support it. But I feel very much like Mr. Joyce and Mr. Garlington. It can be pushed far beyond what the Committee . . . wants here, and when it does, then we are creating a monster.⁷⁴

Delegate Bates added that he thought the proposed section would be a “lawyer’s dream.”⁷⁵

Lawyer-Delegate Dahood defended his Committee’s proposal:

Before the Constitutional Convention accepts a proposal, there’s a public hearing. Before the Legislature passes a law, there is a public hearing. And before a governmental agency passes a rule or regulation that has the force and effect of law, there ought to be a public hearing. Now, that’s what we’re talking about. . . . We submit to you that with the debates that have taken place on this floor here and now and with the journal and with the record that is made, there could be no mistake as to what is intended by Section 8. And the Legislature will carry it out, and the Legislature will set guidelines; and when governmental agencies—and I underscore that—are going to set forth rules and regulations . . . that govern all of us, unlike what they’ve done in the past with callousness and indifference to the American and Montana citizen, they’re going to have to give notice that they are going to do this. And they are going to have to listen to the citizen⁷⁶

After the lawyer-delegates had argued at length about the sunshine provision, Delegate Wilson expressed his own concern that if the lawyers at the Convention could not even agree on the proper interpretation of the clause, the clause would likely continue to be the subject of legal dispute: “If they can’t decide among themselves now, we’re in trouble.”⁷⁷

Prompting laughter among the delegates, nonlawyer Delegate Robinson responded: “I would just like to add that if we have to base decisions on

73. *Id.* at vol. 5, 1658–1659.

74. *Id.* at vol. 5, 1659–1660.

75. *Id.* at vol. 5, 1660.

76. *Id.* at vol. 5, 1661.

77. *Id.*

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only those things that the lawyers can agree on, we'll never adopt any of this Constitution."⁷⁸

Lawyer-Delegate Joyce offered a closing to his motion to delete § 8, stating:

I suppose . . . it's a matter of philosophy as to what should be in a constitution. I happen to believe that constitutions shouldn't contain any sermons. I happen to believe that if you're going to give people rights, they ought to have rights that are enforceable in the courts. . . . I submit that just writing platitudes into the Constitution will do more harm than good. And, in reply to my distinguished delegate, Mrs. Robinson, if us lawyers can't agree, it seems it is an anomaly here that us lawyers are trying to keep away from having a field day with the section, while the rest of you people are trying to force it upon us. And that does seem anomalous to me; and it seems, I might submit to you, that perhaps because we do practice law and we are involved in courts and we are trying to enforce rights in courts, that maybe we do know something about what constitutions are all about. And, of course, those of you who think we do not, even though we come from every different kind of political persuasion, why, that's just a deficiency, I guess, in the public relations of the legal profession.⁷⁹

Lawyer-Delegate Joyce's motion to delete the provision failed on a vote of 37–54, with ten lawyers voting in favor of deleting it and nine voting against.⁸⁰

Debate continued as delegates discussed which branches of government were included within the scope of § 8. Could citizens participate in judicial decision-making? In zoning or legislative deliberations?⁸¹ Delegate Cedor Aronow, lawyer and former legislator, disagreed with Delegate Joyce on the Right of Participation and stated: "I have listened to this debate, and I think a matter of this sort has a proper place in the Constitution."⁸²

Though Lawyer-Delegate Dahood noted that the Bill of Rights Committee's intent was that the legislature would develop guidelines to make the right of participation meaningful, the original provision was not explicit in that regard.⁸³ To clarify that intent, the words "provided by law" were added after a motion by Lawyer Delegate Carl Davis who commented: "We want the Legislature to establish some guidelines, rather than leaving it in doubt."⁸⁴

78. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1661 (Verbatim Transcript).

79. *Id.* at vol. 5, 1661–1662.

80. *Id.* at vol. 5, 1662.

81. *Id.* at vol. 5, 1661–1665.

82. *Id.* at vol. 5, 1665.

83. *Id.* at vol. 5, 1661.

84. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1668 (Verbatim Transcript).

Section 8 was finally adopted in the following form: “The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.”⁸⁵

C. Article II, § 9: Right to Know

The Right to Know provision (Article II, § 9) as proposed and as finally approved provides: “No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”⁸⁶ Delegate Eck explained that the Committee’s purpose in establishing a public right to know was to make all deliberations and resolution of public matters subject to public scrutiny.⁸⁷

In the Committee of the Whole debate on the general floor, delegates quickly zeroed in on the most contentious issue implicit in this section: the proper balance between the right to know and the right to privacy. Lawyer-Delegate Cate objected to the broad privacy-right limitation on the right to know. He stated: “I think this provision is like the Biblical proverb—‘the Lord giveth and the Lord taketh away.’ The first part of that paragraph does give the citizen the right to know, and the second part of that paragraph denies the citizen the right to know.”⁸⁸ Delegate Cate was concerned that the individual’s right to privacy would eclipse the public’s right to know. He proposed limiting the breadth of the right to privacy by adding the words “as may be provided by law” to the section, so that the legislature would determine the situations in which individual privacy exceeds the merits of public disclosure.⁸⁹ Delegate Cate explained that this proposal would satisfy the concern expressed by the Montana Press Association that the Right to Know provision was too weak.⁹⁰

Delegate Eck, however, explained that the Bill of Rights Committee had felt it was better to have the courts, rather than the Legislature, make that determination.⁹¹ Delegate Foster also opposed Cate’s proposed change, expressing frustration that news media had waited to express dissat-

85. Mont. Const. art. II, § 8.

86. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 1088 (Constitution); *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 7, 2636–2637 (Verbatim Transcript).

87. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1670 (Verbatim Transcript).

88. *Id.* at vol. 5, 1671.

89. *Id.*

90. *Id.*

91. *Id.*

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isfaction with the clause until after the Bill of Rights Committee's deliberation was complete.⁹² Like Delegate Eck, he noted that "it was the thinking of the committee, that, in fact the courts would have to strike the balance between the merits of public disclosure and the merits of privacy, and our committee had faith in our courts to strike this balance."⁹³

Delegate Fred Martin, a long-time newspaperman, moved to delete § 9 entirely. Though he had spent 50 years trying to secure a right to know, he felt the privacy-right exception to the right to know made the provision more harmful than helpful.⁹⁴ He referenced an editorial in the morning *Missoulian* that bore the headline "Right to Conceal Must Be Killed."

The words "except in cases in which the demands of individual privacy exceeds the merits of public disclosure" are causing widespread alarm among Montana newspapermen. They believe the words are so vague that they could be interpreted to allow almost any public board, agency or administrator to cover up vital public matters. The Montana Press Association has notified all delegates of its fear that the proposed right-to-know section would become a vehicle for concealment.⁹⁵

Lines were quickly being drawn between the news media and the civil-liberties advocates. Lawyer-Delegate Dahood again rose to give an impassioned defense of the Committee's report:

Mr. Chairman, I oppose the motion to delete, and I think we ought to place proper focus on the position that's taken by the press. The gentlemen of the fourth estate seem to think they have no responsibility in a free society; they have a responsibility. And this particular section was not enacted for their benefit; it was enacted for the benefit of the citizen of the State of Montana. This particular section was in the rough draft that was circulated several weeks back. This particular section was framed after the gentlemen of the press themselves appeared before the committee and said this particular language was acceptable. Recently, someone in an ivory tower in an eastern state, apparently that represents some national press association, has read this particular section and, with his sophisticated training far beyond my own or that of any member of the committee, has decided that the wording in this particular section impairs the right of freedom in a free society. And in the State of Montana, apparently those that represent the press have paid some heed to that clarion call, and they make the same indictment.⁹⁶

The delegates voted 76–14 against Delegate Martin's proposal to delete the provision.⁹⁷

92. *Id.*

93. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1672 (Verbatim Transcript).

94. *Id.*

95. *Id.*

96. *Id.* at vol. 5, 1673.

97. *Id.* at vol. 5, 1676.

The debate then resumed on Delegate Cate's proposed amendment to limit the right to privacy with the words "as may be provided by law," a revision which Lawyer-Delegate Brown favored. Brown stated:

I can see where this would be abused by a County Commissioner, a Governor . . . to deny access to public documents. As a result, you'd have to go to court and end up ultimately with the Supreme Court, which would take years in many cases. We'd be litigating hundreds of cases by public officials denying access.⁹⁸

Lawyer-Delegate Schiltz objected to referring matters to the Legislature from the Bill of Rights. He accused Delegate Brown of throwing up a smokescreen in his assertion that there would be hundreds of cases, stating that the Court would decide the issue in one or two cases.⁹⁹ Lawyer-Delegate Cate's proposed amendment was defeated by a vote of 56 to 30, but 13 of the 21 lawyers voted in support.¹⁰⁰

Prior to the final vote on the section, Delegate Heliker asked a question of Lawyer-Delegate Dahood: "Mr. Dahood, being an ignorant nonlawyer, what is an individual? . . . Is it by any chance also a corporation?"¹⁰¹ Delegate Dahood stated: "An individual, in my judgment, would not be a corporation, no."¹⁰² The section was approved on a voice vote.¹⁰³

What may be one of the most interesting developments in the debate of the Constitution occurred on March 16, just nine days after the adoption of Article II, § 9. Delegate Dahood moved to suspend the rules for the purpose of reconsidering § 9 as a result of continued apprehension of the news media.¹⁰⁴ Delegate Eck explained the reason for the proposed suspension: "[The Bill of Rights Committee has] met and come up with an amendment to this section which appears to be satisfactory to the press. And the committee feels not only it's satisfactory to us, but in reality strengthens the section."¹⁰⁵

The motion to suspend the rules and allow reconsideration, although opposed by some on the Committee, ultimately prevailed.¹⁰⁶ Delegate Dahood moved to amend the privacy-right limitation on the right to know.¹⁰⁷ Under his proposal, the public would have a right to know "ex-

98. *Id.* at vol. 5, 1677.

99. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 5, 1677 (Verbatim Transcript).

100. *Id.* at vol. 5, 1679.

101. *Id.* at vol. 5, 1680.

102. *Id.*

103. *Id.*

104. *Id.* at vol. 7, 2482.

105. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 7, 2482 (Verbatim Transcript).

106. *Id.* at vol. 7, 2483.

107. *Id.*

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cept in cases in which the legislature, subject to court interpretation, shall have determined that the demands of individual privacy exceed the merits of public disclosure.”¹⁰⁸

Lawyer-Delegate Dahood also proposed that the Bill of Rights Committee Report be revised to reflect the reasons for supporting the amendments.¹⁰⁹ Delegate Dahood said the goal was to make the Right to Know section similar to the design of the federal Freedom of Information Act and to ensure that exceptions be defined so as to reduce the potential for abuse of discretion by those who decide to withhold a document or close a meeting.¹¹⁰ In denying access, the agency would have to indicate some basis for its decision and any legislative exemption under this section would be subject to court interpretation and review.¹¹¹ By this compromise, Dahood sought to satisfy the Montana press.¹¹² He stated: “We have not taken away any of the substance incorporated in Section 9, Right to Know, as adopted by this Committee of the Whole.”¹¹³

Many opposed Delegate Dahood’s proposal. Delegate Chet Blaylock, Vice Chairman of the Bill of Rights Committee, opposed his Chairman, noting that it was the first time he had done so. He stated:

First of all, the language that we adopted in this committee was very carefully worked out in the Bill of Rights Committee. We all agreed to it, and then it was presented to this Committee of the Whole, where it was debated very thoroughly. We have many legal people in this room, and they—and we adopted it. Then, after we—shortly before this came before this Committee of the Whole and after its adoption, came the deluge of criticism saying that we just simply had to change this thing.¹¹⁴

Delegate Blaylock expressed frustration that they were reconsidering the section at all, suggesting that Delegate Dahood was overreacting to criticism from the press: “Now . . . a *fait accompli* is what we boys down in Yellowstone mean when . . . we’ve been had.”¹¹⁵

The fact that § 9 was being reconsidered at all suggested to some delegates that such a controversial matter was better left for the Legislature to address. Lawyer-Delegate Davis moved to delete the entire section, suggesting that amending it to reflect the news media’s concern would be bowing to special-interest pressure.¹¹⁶

108. *Id.* at vol. 7, 2484.

109. *Id.*

110. *Id.*

111. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 7, 2482 (Verbatim Transcript).

112. *Id.*

113. *Id.*

114. *Id.* at vol. 7, 2485.

115. *Id.*

116. *Id.* at vol. 7, 2488.

Lawyer-Delegate Dahood spoke in favor of his amendment, speaking specifically to Lawyer-Delegate Davis's concerns. Delegate Dahood wanted all the delegates to know that the Right to Know section was fully discussed and debated in the Bill of Rights Committee.¹¹⁷ He said that it was the type of constitutional right that had to be expressed in general terms, "a principle that must endure for the decades and the ages."¹¹⁸

Lawyer-Delegate Davis agreed that the Right to Know section was a very important right but questioned whether it should be in the Constitution, arguing that it should be left up to the Legislature.¹¹⁹ Delegate Davis's motion to delete the Right to Know provision failed: 33 delegates voted in favor of his motion and 56 against.¹²⁰

Several people then spoke against Dahood's amendment. Delegate Jean Bowman questioned who had actually written the amendment, but stated that her primary objection was the way it was handled.¹²¹ She said: "I would agree . . . that we have reacted to public opinion before, but we have not acquiesced to the public opinion before, and it occurs to me that this is what we're just about to do."¹²²

Lawyer-Delegate Berg also expressed his disapproval: "I think it is an absolute right of every citizen to know what's going on in the government that he elects. But I rise in opposition to this proposed amendment. I think it is just so much gobbled-gook. I can't really believe that it's been written by anyone who understands the nature and function of government."¹²³

Chairman Graybill asked to be relieved of the Chair, so he could also speak on this issue. He stated:

I rise with some hesitation to oppose the Chairman of the committee on this matter, but I do so partly because I notice that he rises with some reluctance himself to change this language. . . . First of all, a Bill of Rights is the document of the Constitutional Convention and of the Constitution, and that's what we're on, Bill of Rights. It is our statement of the rights of the people . . . and this language says that we'll give it to the Legislature. . . . [B]ut we should not push on the Legislature the duty of determining what the rights of the people are in this state. . . . I'm concerned because I understand the newspaper's lawyer had something to do with this. . . . I don't think the press has yet thought this thing through. The press has to go and demand what it wants, and if an agency makes an unreasonable determination, the press has to take them to court and whip them; that's the only way this thing's going to

117. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 7, 2489 (Verbatim Transcript).

118. *Id.*

119. *Id.* at vol. 7, 2491.

120. *Id.* at vol. 7, 2493.

121. *Id.* at vol. 7, 2496.

122. *Id.*

123. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 7, 2496 (Verbatim Transcript).

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work. But the way the committee originally drew it, at least the little guy's got something to say to that agency man when he goes to the door; he's got the Constitution. But he hasn't got anything when we get through amending it.¹²⁴

The press's amendment as proposed by Lawyer-Delegate Dahood failed on an 18–70 vote.¹²⁵ Ultimately, § 9 remained as it was originally proposed and was approved by a vote of 74–33.¹²⁶

In conjunction with the Right of Participation (Article II, § 8), the Right to Know has “helped bring state bureaucracy to an understanding that government is derived from the people, is intended for the benefit of the people, and the people have a right to know what their government is doing.”¹²⁷

D. Article II, § 10: Right of Privacy

As proposed by the Bill of Rights Committee, Article II, § 10 read: “The right of privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”¹²⁸

The Convention delegates believed that though the Montana Supreme Court had recognized a right to privacy, it was important to explicitly include the right in the Constitution.¹²⁹ Lawyer-Delegate Campbell noted that “the right of privacy is a right which was not expressly stated in either the United States or the Montana Constitution,” and he asserted the importance of making the right explicit:¹³⁰

[T]oday we have observed an increasingly complex society and we know that our area of privacy has decreased, decreased, and decreased. . . . Today, with wiretaps, electronic and bugging devices, photo surveillance equipment and computerized data bands, a person's privacy can be invaded without this knowledge and the information so gained can be misused in the most insidious ways. It isn't only a careless government that has the power to pry; political organizations, private information gathering firms, and even an individual can now snoop more easily and more effectively than ever before. We certainly hope that such snooping is not as widespread as some persons would have us believe, but with technology easily available and becoming more refined all the time, prudent safeguards against the misuse of such technology are needed. . . . We think the right of privacy is like a number of other

124. *Id.* at vol. 7, 2496–2497.

125. *Id.* at vol. 7, 2498.

126. *Id.* at vol. 7, 2636–2637.

127. Elison & Snyder, *supra* n. 37, at 48. See generally Fritz Snyder, *The Right to Participate and the Right to Know in Montana*, 66 Mont. L. Rev. 297 (2005).

128. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 632 (Committee Proposals).

129. Elison & Snyder, *supra* n. 37, at 49.

130. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1680 (Verbatim Transcript).

inalienable rights; a carefully worked constitutional article reaffirming this right is desirable.¹³¹

In making the Bill of Rights Committee report to the Committee of the Whole, Lawyer-Delegate Campbell proposed an amendment to add the word “individual” to the provision so that it was clear the right was intended to protect individual privacy.¹³² When Delegate Babcock questioned whether “this [would] preclude a corporation made up of family members,”¹³³ Campbell responded: “We do not feel that a corporation is an individual. It can be considered a person, but not an individual.”¹³⁴ By a voice vote, the word “individual” was added to the Right of Privacy section.¹³⁵

On a motion by Delegate Harper and with very little debate, the Convention then voted to delete the words “without the showing of a compelling state interest.”¹³⁶ However, two days later, Lawyer-Delegate Thomas Ask requested that Delegate Harper move to reconsider the deletion of that clause.¹³⁷ He noted that he had spoken with the Attorney General and University of Montana Law School Professor Larry Elison about how an absolute right of privacy would be interpreted. Ask explained that neither the Attorney General nor Elison, a professor of constitutional law, could predict how the courts would interpret an absolute right of privacy.¹³⁸ Ask went on to say:

Now, I don't know either, but are we going to put something into the Constitution that we don't know how the courts are going to interpret it? Shouldn't we put something in there that's clear? And I submit that we don't have absolute complete right of privacy in all phases. The U.S. Supreme Court doesn't feel that way, and certainly when there is a compelling state interest they can invade privacy. Now, I don't know what we are doing here, but I think the majority proposal is right that we should leave those words in there.¹³⁹

Delegate Campbell opposed the motion for reconsideration, arguing that the right of privacy had been established for some time and thus the limitation was unnecessary.¹⁴⁰

131. *Id.*

132. *Id.*

133. *Id.* at vol. 5, 1681.

134. *Id.*

135. *Id.* at vol. 5, 1680–1681.

136. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 5, 1682 (Verbatim Transcript).

137. *Id.* at vol. 6, 1850.

138. *Id.* at vol. 6, 1851.

139. *Id.*

140. *Id.*

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Delegate Ask responded: “By putting these words [“without the showing of a compelling state interest”] in, we’re giving direction to the court how they are going to interpret this. If there’s no compelling state interest, you can’t invade a person’s right of privacy.”¹⁴¹

After the Committee of the Whole approved the motion to reconsider by a voice vote of 56–33, Delegate Ask moved to adopt the original committee proposal as previously amended to include the term “individual.”¹⁴² The discussion was relatively brief. Lawyer-Delegate Dahood responded that the Bill of Rights Committee did not object to adding back in the clause limiting the right of privacy in the face of a compelling state interest, but noted that he did not believe Lawyer-Delegate Ask’s concerns were valid.¹⁴³ Lawyer-Delegate Kelleher indicated that he believed the addition would unnecessarily weaken the section and render the right meaningless.¹⁴⁴ Despite these concerns, the motion passed.¹⁴⁵ The lawyer-delegates helped guide the other delegates in their understanding of the importance of privacy in our society today and also in the importance of the word “individual” and the phrase “without the showing of a compelling state interest.”

E. Article II, § 12: Right to Bear Arms

Article II, § 12 is identical to the corresponding provision in the 1889 Constitution,¹⁴⁶ but its debate provided some interesting comments from lawyers and nonlawyers alike, revealing the idealism of some and the pragmatism of others.

The section states: “The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.”¹⁴⁷

Delegate Berthelson—a nonlawyer—made a motion to add the following nine words to this sentence: “nor shall any person’s firearms be registered or licensed.”¹⁴⁸ Prior to the Convention, candidates had been asked if they would support the retention of the 1889 Constitution’s provision re-

141. *Id.* at vol. 6, 1852.

142. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 6, 1852 (Verbatim Transcript).

143. *Id.*

144. *Id.*

145. *Id.* at vol. 6, 1853.

146. Mont. Const. (1889) (superseded by 1972 Mont. Const.).

147. Mont. Const. art. II, § 12.

148. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 5, 1725–1726 (Verbatim Transcript).

garding the right to bear arms. However, in the floor debate, Delegates Cross and Jacobsen noted they had been subject to a massive lobbying effort in recent weeks to insert those nine words, which were not in the original provision.¹⁴⁹

Delegate James—a nonlawyer—confronted threats that the Constitution would not pass if these words were not inserted, saying: “I think it’s time to stand on our feet as men and reject these threats.”¹⁵⁰

Lawyer-Delegate Murray, on the other hand, favored the Berthelson amendment, explaining: “I can’t think of one single thing that we could add to our Constitution that would attract voters faster than the adoption of this particular amendment.”¹⁵¹

Likewise, Delegate Davis was pragmatic: “I’ve been inclined and very desirous of supporting the majority position on this issue.”¹⁵² He went on: “[B]ut I want a Constitution that we can support. And also, as kind of, I hope, a little practical politician. Now, basically, these gun people are ‘aginners.’”¹⁵³ He concluded that by inserting these words, the delegates would give “aginners” a reason to support the Constitution.¹⁵⁴

Lawyer-Delegate Dahood rose to defend the Bill of Rights Committee’s proposal: “I sincerely submit that the most prominent nonissue that has been presented on the Convention floor is this issue.”¹⁵⁵ Dahood noted that no one on the Committee was in favor of registration and went on: “I am not prepared to state, however, with utmost clarity for the future that we may never have a situation where perhaps handguns, in order to preserve law and order in society, may not fall under some legislative directive that may compel registration.”¹⁵⁶

Nonlawyer Delegate Heliker quipped:

If this is not an issue, then why make an issue out of it? As a matter of fact, I think registration is an issue. The proponents of the majority report have said as much. They said it’s not an issue today, but it will be an issue sometime in the future. I don’t think the people of Montana want gun registration now or in the future.¹⁵⁷

Interestingly, Heliker then went on to agree with Delegate Dahood that this was a “non-issue.”¹⁵⁸

149. *Id.* at vol. 5, 1727–1728.

150. *Id.* at vol. 5, 1728.

151. *Id.* at vol. 5, 1729.

152. *Id.*

153. *Id.* at vol. 5, 1730.

154. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 5, 1730 (Verbatim Transcript).

155. *Id.*

156. *Id.* at vol. 5, 1731.

157. *Id.* at vol. 5, 1731–1732.

158. *Id.*

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Lawyer-Delegate McNeil also spoke in support of the Berthelson amendment, saying: “We’re talking about the real heart of what is important to Montanans. In addition, I think it would be very nice to have all the gun nuts, and I number myself among them, supporting our Constitution.”¹⁵⁹

Nonlawyer Delegate Heliker’s analysis is sounder from a legal standpoint than that of lawyers Dahood and McNeil on this point. Whether to explicitly prohibit gun registration in a constitution is very much an “issue.” The fact that the United States Constitution is silent on this particular issue has resulted in continuing litigation over whether the Second Amendment precludes gun registration.¹⁶⁰

Debate was prolonged on Mr. Berthelson’s amendment. Lawyer-Delegate Schiltz weighed in against and Lawyer-Delegates Habedank and Campbell weighed in for the amendment, with Campbell noting that the federal standards would control anyway.¹⁶¹ The amendment failed, 52 to 43, with nine lawyers voting in favor and 11 voting against.¹⁶² In the end, the original provision was approved by a vote of 76–6.¹⁶³

F. Article II, § 16: Administration of Justice

One of the debates that speaks to the power and influence of Lawyer-Delegate Dahood in the Convention was the Committee of the Whole debate on Article II, § 16. The parallel provision under the 1889 Constitution provided that “[c]ourts of justice shall be open to every person and speedy remedy afforded for every injury of person, property or character.”¹⁶⁴

The Bill of Rights Committee voted to retain that exact wording of § 16,¹⁶⁵ but added the following language:

No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate em-

159. *Id.* at vol. 5, 1733.

160. See James B. Jacobs & Kimberly A. Potter, *Comprehensive Handgun Licensing & Registration: An Analysis and Critique of Brady II, Gun Control’s Next (and Last?) Step*, 89 J. Crim. L. & Criminology 81 (1998); Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (a Call to Historians)*, 73 Fordham L. Rev. 653 (2004); Deborah Homsher, *Response to Bernard E. Harcourt’s On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (a Call to Historians)*, 73 Fordham L. Rev. 715 (2004).

161. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1735, 1738–1739 (Verbatim Transcript).

162. *Id.* at vol. 5, 1742.

163. *Id.* at vol. 5, 1744. A significant number of delegates were absent at the time of the vote.

164. Mont. Const. art. III, § 6 (1889) (superseded 1972 by Mont. Const. art. II, § 16).

165. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 622 (Committee Proposals).

ployer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.¹⁶⁶

This language had as its stated purpose the overturning of a recent Supreme Court case.¹⁶⁷ The Montana Supreme Court in *Ashcraft* had denied the ability of an injured worker who was covered under the Workers' Compensation Act to sue a third party for an injury on the job.¹⁶⁸ In presenting § 16 to the Bill of Rights Committee of the Whole, Lawyer-Delegate Murray stated:

[W]e feel that the right to a third party action is a right we should establish in our Constitution. It is a right which working men and women who are unfortunate enough to be injured have had for nearly 80 years in this state. We feel that it was wrongly taken away from these people by the Supreme Court. . . . We feel that perhaps we are legislating in asking that this be written into our [Constitution, but we of the committee really believe that] we are acting in a judicial manner in asking that it be written in the Constitution for we feel that this Convention, perhaps, is the court of last resort for injured working men and women. . . .¹⁶⁹

Lawyer-Delegate Habedank offered a motion to delete that language and then admonished the delegates:

I have no objection to this being in here if you put it in here with full knowledge of what you are doing. The decision of the Supreme Court in the *Ashcraft* case, which I heard and which was brilliantly argued by Mr. Dahood, made quite a change in what a lot of us thought the law was. However, they were interpreting a specific statute of the State of Montana. All that is necessary to change their interpretation is to amend the statute And you, if you adopt this particular provision, are writing into the Constitution by vote of a majority of this group what I consider to be a strictly statutory matter.¹⁷⁰

Noting that he had not intended to speak on this matter as he was trial counsel to the injured workman,¹⁷¹ Lawyer-Delegate Dahood rose and gave one of his most impassioned and eloquent speeches of the Convention. The following are some excerpts from that speech:

The Montana Trial Lawyers Association, 150 members strong, to a man, without a dissent, believes that this Constitutional Convention must return this right to the injured working man. The unions, without exception, believe that a very basic right has been taken away from the injured working man in the State of Montana, and I understand that the corporate interests that specifi-

166. *Id.* at vol. 2, 622.

167. *Ashcraft v. Mont. Power Co.*, 480 P.2d 812 (Mont. 1971).

168. *Id.*

169. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1754 (Verbatim Transcript).

170. *Id.* at vol. 5, 1755.

171. *Id.*

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cally are involved in this have decided that they will not ask anyone to offer opposition to it on the Convention floor.¹⁷²

This particular right was taken away after 80 years, so promptly legislators introduced in the Senate a bill to overcome that. It passed the Senate Promptly the lobby of the vested corporate interests went across the hall—and we determined this to be true—and made sure it did not pass in the House. So we're now at the court of last resort.¹⁷³

In addressing the charge that this matter was legislative in nature, Dahood reasoned it was necessary that the term “Workmen’s Compensation” be used in the section, because it was that particular statute that the Court had misinterpreted.¹⁷⁴ He stated:

[T]his technicality, having to use the word “Workmen’s Compensation” in this particular section, which we didn’t want to do, because the minute we did we knew that somebody would jump up and say it’s legislative, but if you’re going to draft something with precision and you want to make sure that all that you’re doing is returning the law to what it was prior to this decision a year ago, you are compelled sometimes, in fashioning this precise language to use that language that may be seized on by someone else as legislative. It is not. It is giving back a basic constitutional right that the citizen of Montana had prior to that particular decision. And we submit to you that by this particular provision, all that we are doing is returning that right to the working man; and how can anyone truly, justly object to doing that and only that?¹⁷⁵

In closing on his motion to delete the language, Delegate-Lawyer-Habedank stated:

You’ve had the matter very fairly presented to you by Mr. Dahood. As I told you in the first place, I do not particularly oppose this particular amendment, but I have been told that we lawyers are writing the Constitution, trying to slip matters into the Constitution for our own personal gain. . . . This is something that can be corrected by the Legislature. . . . I leave it to you, but I do think that when you do it, you should do it knowing what you do and not accuse the lawyers of pulling the wool over your eyes.¹⁷⁶

On a roll-call vote, 14 voted in favor of eliminating the perceived statutory language, and 76 voted against it.¹⁷⁷ Of the 20 lawyers voting, five voted in favor of the deletion—Berg, Brazier, Felt, Garlington and Habedank—and 15 against it.¹⁷⁸

Non-lawyer Delegate Dorothy Eck’s comments are telling:

I admit that when it first came up . . . I was appalled at the idea of having something like this in the Bill of Rights. Since that time, I have talked to a

172. *Id.* at vol. 5, 1756.

173. *Id.*

174. *Ashcraft*, 480 P.2d at 813.

175. *Id.* at vol. 5, 1757.

176. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1758 (Verbatim Transcript).

177. *Id.* at vol. 5, 1758–1759.

178. *Id.* at vol. 5, 1759.

good many lawyers. I've only run into a couple of them who don't feel that this Supreme Court case . . . was grossly unfair, that an injustice was done to the State, and that the best way to remedy it would be to put it into the Constitution. I did talk with one district judge who suggested that, given a period of time, the climate and the character of the Supreme Court probably would change and they would—probably would reverse this. But I think that in the meantime a good many Montanans are going to suffer an injustice, and I think that, for the most part, our Bill of Rights is really to prevent injustice, even to the few. I also hesitated seeing it come up on the floor, because I think it really represents a slap in the face to our Supreme Court.¹⁷⁹

While almost everyone agrees the Convention delegates were, as a general rule, able to keep legislative matters out of the Constitution, this provision was a clear exception to the rule. It appears that the facts of the *Ashcraft* case, the oratory of Lawyer-Delegates Dahood and Murray, and the widely held belief at that time that Montana Power exerted such influence over the Legislature and the Judiciary¹⁸⁰ that it could effectively block the necessary change were all too compelling to delete the offending “legislative” provision.

G. Article II, § 18: Sovereign Immunity

Lawyer-Delegate Cate sponsored a delegate proposal to abolish sovereign immunity which later became Article II, § 18: “The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property. This provision shall apply only to causes of action arising after June 1, 1973.”¹⁸¹ This section was based on a “commitment to the idea that government should be responsible for its derelictions, errors, and omissions,”¹⁸² and both Lawyer-Delegates Dahood and Murray spoke strongly in favor of it.¹⁸³

In presenting this provision to the floor, Delegate Murray explained: This is the doctrine—all of us know it—the vernacular that the king can do no wrong. It is an old and archaic doctrine, but is one which the State of Montana has adhered to . . . [W]e think that now is the time and that this is the place for Montanans to do away with this particular archaic doctrine.¹⁸⁴

As originally proposed, the provision read: “The state and its subdivisions shall have no special immunity from suit.”¹⁸⁵ Lawyer-Delegate

179. *Id.* at vol. 5, 1758.

180. *Id.* at vol. 5, 1756–1757.

181. *Montana Constitutional Convention Proceedings*, supra n. 6, at vol. 2, 959 (Bill of Rights Proposal).

182. Elison & Snyder, *supra* n. 37, at 64.

183. *Montana Constitutional Convention Proceedings*, supra n. 3, at vol. 5, 1763–1764 (Verbatim Transcript).

184. *Id.* at vol. 5, 1760.

185. *Id.*

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Habedank offered an amendment to the proposed section by adding after “suit” the following words: “for injury to a person or property.”¹⁸⁶

Delegate Murray stated he had reviewed the proposed amendment with Mr. Dahood and they had no objection.¹⁸⁷ Only Lawyer-Delegate Holland expressed concern about this limitation.¹⁸⁸ The amendment passed without noted opposition, on a voice vote.¹⁸⁹

Lawyer-Delegate Garlington then raised the question of the proper interpretation of “state and its subdivisions” and suggested greater precision was needed:

I have reference to local government units and school districts, and it seems to me that this language does not very clearly point to any particular area, and we therefore are building up controversy as to how far this immunity extends. And I think we would have an obligation in this body so to construct our language that we do not create an ambiguity—litigation if we can help it.¹⁹⁰

Lawyer-Delegate Dahood acknowledged Lawyer-Delegate Garlington’s point and said there might be some question with respect to the extent of the language “the state and its subdivisions.”¹⁹¹ However, Dahood responded without specifically addressing the concern:

What our committee is really concerned about is making sure that an antiquated doctrine that had no place within American jurisprudence in the first instance is removed from the face of justice in the State of Montana. . . . There isn’t a legal scholar that I have read over the past two decades of practicing law, and I’m sure my colleagues here on the Convention floor will agree, that can justify the retention of that particular doctrine . . . in Montana and in any of the states of this particular democracy. . . . We think if it’s adopted in the language in which it is submitted, that it’s going to tell our Supreme Court we *do not* want that doctrine in the State of Montana. . . . That will be our epistle to justice in the State of Montana and will improve its administration for the benefit of all of us.¹⁹²

After this discussion, §18 passed on a voice vote.¹⁹³ Fortunately, Lawyer-Delegate Murray stated for the record on March 8, 1972, in response to Mr. Garlington’s concern, that the provision would apply to all political subdivisions.¹⁹⁴ On March 13, 1972, the Committee on Style, Drafting,

186. *Id.*

187. *Id.* at vol. 5, 1761.

188. *Id.*

189. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 5, 1762 (Verbatim Transcript).

190. *Id.*

191. *Id.* at vol. 5, 1763.

192. *Id.* at vol. 5, 1763–1764 (emphasis added).

193. *Id.*

194. *Id.* at vol. 5, 1762.

Transition and Submission submitted its Report on the Bill of Rights.¹⁹⁵ In the first sentence of § 18, the words “counties, cities, towns, and all other local governmental entities” replaced the words “and its subdivisions.”¹⁹⁶ On March 18, 1972, the Convention passed this amended version by a vote of 84 to 13.¹⁹⁷

It is interesting to note that Delegate Rygg, a former legislator, raised a question about the cost of this provision to the State.¹⁹⁸ Delegate Murray responded that he did not think there would be any such cost.¹⁹⁹ And prior to Mr. Dahood’s final speech on the provision, Delegate Oscar Anderson asked of Delegate Murray: “Would you or your committee object to the addition of the word[s] ‘the Legislature may provide for reasonable limitations?’”²⁰⁰

Delegate Murray responded: “I don’t think that we would object to that particularly. That’s in the North Dakota Constitution, is it not?”²⁰¹

Delegate Anderson then stated: “Being a non-lawyer, I’m not going to make a motion, but I sure wish somebody else would.”²⁰² That did not happen and the issue of legislative limitations did not arise in the Convention again. As a result of “effective lobbying by tradition-bound politicians and frightened government employees,” a constitutional amendment was proposed by the Legislature in 1973 and approved by the voters in 1974.²⁰³ It added to § 8 the following words: “except as may be specifically provided by law by a 2/3 vote of each house of the legislature.”²⁰⁴

H. Other Proposed Rights

As should already be apparent, the lawyer-delegates were not of a single mind on many issues.

Lawyer-Delegate Robert Kelleher was an idealist and had interesting perspectives on many things, including favoring a parliamentary form of government.²⁰⁵ He proposed a new constitutional section: “A human fetus

195. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol.2, 955–973 (Report of Committee on Style, Drafting, Transition and Submission).

196. *Id.* at vol. 2, 964.

197. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 7, 2645–2646 (Verbatim Transcript).

198. *Id.* at vol. 5, 1762.

199. *Id.*

200. *Id.* at vol. 5, 1763.

201. *Id.*

202. *Id.*

203. *Elison & Snyder*, *supra* n. 37, at 64.

204. *Mont. Const. art. II, § 18.*

205. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 751 (Verbatim Transcript).

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has the right to be born. The incurably ill have the right not to be kept alive by extraordinary means.”²⁰⁶ The Bill of Rights Committee rejected the provision,²⁰⁷ and Delegate Kelleher later moved to incorporate part of the provision into Article II, § 3, the section of the Bill of Rights that lists Montanans’ “Inalienable Rights.”²⁰⁸ Lawyer-Delegate Dahood encouraged the Committee of the Whole to reject the provision:

What Delegate Kelleher is attempting to do at this time is, by constitutional command, prohibit abortion in the State of Montana. That issue was brought before the committee. We decided that we should not deal with it within the Bill of Rights. It is a legislative matter insofar as we are concerned.²⁰⁹

The Committee of the Whole voted down Delegate Kelleher’s motion by a vote of 71 to 15.²¹⁰

Delegate Kelleher also attempted to add three additional sections to Article II. Kelleher’s proposed § 36 would have stated: “Addiction neither to alcohol nor drugs is a crime.”²¹¹ His proposed § 37 would have read: “Incarcerated persons lose none of their human or civil rights when convicted of a felony, other than the choice of habitation, the right to vote and to hold public office. No incarcerated person may be placed in solitary confinement.”²¹² Finally, Kelleher’s proposed § 38 would have stated: “Private sexual acts between consenting adults do not constitute a crime.”²¹³ These provisions were all defeated.²¹⁴

The Montana Constitution’s Declaration of Rights (Article II) is our epistle to justice. The lawyer-delegates played a major role in drafting its key sections and were no doubt aware, more than most, of the long legal life that each provision would have. These particular provisions have certainly made our state Constitution particularly resilient.

IV. ARTICLE VII: THE JUDICIARY

Four lawyers were on the Judiciary Committee, but almost all the lawyers in the Convention debated the proposed judiciary article. In fact, the transcript of proceedings reveals the lawyers not only dominated the discus-

206. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 223 (Delegate Proposals).

207. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 649 (Committee Proposals).

208. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1640 (Verbatim Transcript).

209. *Id.*

210. *Id.* at vol. 5, 1640–1641.

211. *Id.* at vol. 6, 1843.

212. *Id.* at vol. 6, 1846.

213. *Id.* at vol. 6, 1849.

214. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 6, 1640, 1845–1846, 1848, 1850 (Verbatim Transcript).

sion and debate on the Convention floor, but met together to try hammering out a compromise on the article because of the deep differences in the Judiciary Committee.²¹⁵

The Judiciary Committee submitted a split recommendation to the Convention: a majority plan supported by five of its members (including Lawyer-Delegate Holland, the Chairman of the Committee, and two of the other lawyers—Aronow and Schiltz) and a minority plan supported by four of its members and written by Ben Berg, the fourth lawyer on the Committee.²¹⁶ There were significant differences between the two plans. Committee Chairman Delegate Holland summed up the difference—at least philosophically—as follows:

Basically what the majority has done is take the Judicial Article as it now is in the present Constitution, largely readopted it, except in such places as we felt there was a need for a change. The minority, on the other hand, have completely rewritten—made a brand-new Judicial Article.²¹⁷

For a number of delegates at the Convention, judicial reform was their highest priority. Among those was Vice-Chairman of the Judiciary Committee Catherine Pemberton, a rancher and newspaper woman from Broadus.²¹⁸

While the majority and minority reports took different positions on many issues, the most significant and divisive was how Supreme Court justices and district court judges would be selected. The majority plan called for elections of judges; the minority plan called for the appointment of judges by the governor, subject to approval by the State Senate from nominees provided by a screening committee.²¹⁹ There were other significant differences between the two reports. The majority plan retained the justices of the peace, while the minority plan did not;²²⁰ the majority plan gave the Supreme Court no rulemaking power, while the minority plan did;²²¹ the majority plan called for the election of the Clerk of the Supreme Court, while the minority did not.²²² Both the majority and the minority had as

215. *Id.* at vol. 4, 1069.

216. *Id.* at vol. 4, 1011.

217. *Id.*

218. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 22, 55 (Delegate Information).

219. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 496 (Judiciary Committee, Majority Proposal (§ 29)); *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 511 (Judiciary Committee, Minority Proposal (§ 7)).

220. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 489 (Judiciary Committee, Majority Proposal (§ 16)).

221. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 510 (Judiciary Committee, Minority Proposal (§ 2)).

222. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 487 (Judiciary Committee, Majority Proposal (§ 7)); *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 513 (Judiciary Committee, Minority Proposal (§ 11)).

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their stated purpose the creation of an independent judiciary, but as the transcript of proceedings reveals, each side was convinced that their proposal would best accomplish that goal.

Lawyer-Delegate Berg presented the overview of the minority report and likened his and Lawyer-Delegate Holland's presentations to final arguments in court.²²³ He quipped:

But I am reminded now, in the beginning, of an admonition my mother gave me years ago. She used to say, "I wonder if that boy will ever learn to talk?" And then later, and forever, she said, "Will he ever learn to say anything?" Now, as I listened to Mr. Holland this morning, I was reminded of my mother's admonition, much as he thinks of his father or grandfather, and I was impressed with this thought, that he spent so much time on the minority viewpoint of the Judicial Article that it must, for that simple reason, have some merit. And it's that merit that I want to discuss with you as briefly and as concisely as I can. But I also want to make this observation. There was considerable criticism this morning of the brevity and perhaps the so-called novelty of the minority plan. I take credit, if credit is due, for the brevity I was astonished this morning to hear the United States Constitution, and particularly the judicial portion, the Judicial Article of that Constitution, also accused of brevity, which I have always thought was the mark of fundamental, good constitutional writing. And if the minority article suffers from brevity, so be it. I'm proud of it.²²⁴

At the outset of the debate on the Judicial Article, Lawyer-Delegate Brown, who chaired the Committee of the Whole, noted the majority and minority proposals were so different that if the Convention proceeded on the majority report, the debate would become very involved.²²⁵ Brown suggested that each side give a short discussion of their proposals, so the delegates could then decide whether to use the majority or minority report as the vehicle for debating the Judicial Article.²²⁶

Delegate Holland agreed, noting that the majority report had 33 sections and the minority report had 13 and that it would be impossible to amend back and forth:²²⁷

With the consent of all of the Judiciary Committee, it's our desire to debate generally the—not debate but to inform generally the delegates of the nature of the plans and then ask the delegates to give us a tentative vote and then roll section by section, with either the majority or minority.²²⁸

Lawyer-Delegate Holland, in his opening two-and-a-half-hour presentation of the majority proposal, traced the history and importance of the

223. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1019 (Verbatim Transcript).

224. *Id.*

225. *Id.* at vol. 4, 1010.

226. *Id.*

227. *Id.*

228. *Id.*

right to vote, particularly the right to vote for judges.²²⁹ Holland's speech was both entertaining and earnest. He was very critical of the "Montana Plan" (which was neither the majority proposal nor the minority proposal), which was proposed by Montana Citizens Conference for Court Improvement "but written by the law school professors."²³⁰ In speaking of the America Judicature Society, Holland claimed: "[T]hey have been going around to various state constitutions and to various organizations, attempting to convince the people of the United States that they're not smart enough to vote for judges and it is only us lawyers that are smart enough to have this power."²³¹ Holland continued:

And I'm saying to you that if the minority proposal is finally adopted by this body, you're taking a whole new keg of nails on. I don't know how the court's going to interpret it, and I know that Mr. Berg thinks he does, but, by gosh, I've seen courts do odd things, and I say you're way better off to stick with the old tried and true.²³²

After Delegate Holland finished, Delegate Pemberton presented the minority plan, which began: "This article was drawn with the idea that the judicial branch must be as strong as the other two; that its officers be as free from obligation as humanly possible; and, that the choice of judicial officers be the responsibility of the Legislative and Executive branches and the voters."²³³ Pemberton, who had been waiting to respond to Delegate Holland, stated: "I, personally, am committed not toward anything specific except court improvement. . . . I do not feel that the majority has gone forward or has court improvement within its article. . . . I feel that the minority has written a very good article, and it is written for Montana."²³⁴

With respect to the pivotal issue between the two reports—the selection of judges—several delegate-lawyers offered cogent and compelling arguments for election or appointment of judges. Lawyer-Delegate Schiltz, who had run for the Supreme Court and lost, described in detail the difficulties and pressures a lawyer faces in running for the Court, but, while ac-

229. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1011–1017 (Verbatim Transcript).

230. *Id.* at vol. 4, 1011–1012. The law professors he referred to were Dean Sullivan, Donald Mason & Duke Crowley. The Montana plan provided for a unified court system, with administrative machinery to secure coordinated and efficient operation, merit selection of judges, and flexibility. Jean M. Bowman, *The Judicial Article: What Went Wrong?*, 51 *Mont. L. Rev.* 492, 493, n. 2 (1990).

231. *Id.* at vol. 4, 1013.

232. *Id.* at vol. 4, 1016.

233. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 514 (Committee Proposals). Lawyer-Delegate Berg and Delegate Pemberton were joined in the minority report by Delegate Bowman and J. Mason Melvin. *Id.* at vol. 1, 513.

234. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1018 (Verbatim Transcript).

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knowledging that it is not a good system, nevertheless explained why he supported the election of judges:

I submit to you that in this State of Montana . . . where we have strong corporate influence; where, if I can elect a Governor, and through that office nominate and appoint the district and the Supreme Court judges, I can run this state. . . . I can own it. And Mr. Berg's system doesn't answer that problem. . . . In our committee hearings, some youth from the law school came over and said, "Why don't you pick them the way this Constitutional Convention Commission was picked?" And, fortunately, I was loaded for that kid. We had—the House picked four people, two from each party; the Senate picked four people, two from each party; the Governor picked four, two from each party; and the Supreme Court picked four, two from each party. Do you know what we wound up with? We wound up with four attorneys on that Constitutional Convention Commission who were attorneys for the Montana Power Company, and one of them became Chairman of the commission. Now, it is impossible in this state—and I didn't check their other qualifications, like railroads and the Anaconda Company and that sort of thing—but you cannot, and I challenged Mr. Berg many times and I challenged the rest of the minority, you cannot pick a committee in the State of Montana that will be totally free of that kind of influence. And I am afraid of it, and if I have to choose between one or the other, I'm going to the electorate every time²³⁵

After the introductory presentations, Delegate Toole stated: "I am very much disappointed in these two reports, after all of the work that has gone into planning the Judicial system for Montana, but between the two, the minority report is the best."²³⁶

Lawyer-Delegate Garlington, with respect to the selection of judges, said:

I guess what I have to say has a bearing on which one of these to start on. I wouldn't take the time of the Convention to do this except that this is the field to which I have devoted my life, and I feel more at home in discussing the problems of the legal profession than any other. There is clear agreement on the part of all that we do need good judges. It would be obvious that they have to come from the practicing bar in the area in—where they are to serve. The question is how to recruit them. They cannot be recruited by the attractions of high pay, because the judges don't receive high pay—nor by great prestige, because the judges do not have that—not by exciting work, because the work of the judge is anything but exciting. I think the real attraction for it to a lawyer is that it fills his sense of willingness to render a good public service. Now, what is involved in the decision of a lawyer who is considering whether to go on the bench? This is the thing that I would like all of the lay people to consider quite closely, because it is one of the root problems in getting any man to be willing to get on the bench.²³⁷

235. *Id.* at vol. 4, 1026–1027.

236. *Id.* at vol. 4, 1027.

237. *Id.* at vol. 4, 1032.

Garlington went on to list all of the things a lawyer must give up to run for the court, particularly his practice and his client.²³⁸ And, if at the end of four years he is not reelected, “he then begins at absolute rock bottom.”²³⁹ Lawyer-Delegate Garlington felt it was necessary to have a system of screening and then appointment to provide a more secure future for those willing to be judges.²⁴⁰ In closing, he stated: “I feel . . . that the minority plan offers us greater advantages in this direction than does the majority plan.”²⁴¹

After Mr. Garlington’s speech there was a vote on Lawyer-Delegate Berg’s substitute motion to have the Committee of the Whole consider the minority report rather than the majority report.²⁴² With that vote, it became clear that a majority of the delegates favored judicial reform because, as Lawyer-Delegate Arness said, the majority plan was essentially a restatement of existing articles in the 1889 Constitution.²⁴³ In a vote of 49–37, the delegates voted for the first and only time of the Convention to proceed with the debate of a minority report.²⁴⁴ However, only eight of the 24 lawyers voted to proceed with the minority report, indicating at least initially that most of the lawyers favored the status quo of the Judiciary.²⁴⁵ One can surmise that lawyers, similar to other professions or groups, become comfortable with what they are used to and are reluctant, without clear reasons, to embark on a new system.

Very few delegates other than lawyers participated in the debate on the Judicial Article. Perhaps, given its technical nature, this was not surprising. The record shows that the nonlawyer delegates were clearly concerned about the lawyers’ sharp disagreements on technical matters like jurisdiction, writ of supervisory control, and trial de novo.²⁴⁶ For example, Delegate Wilson expressed concern, though he “hesitate[d] to get up . . . and get embroiled amongst the lawyers” that such a controversial judicial article would lead to multiple lawsuits.²⁴⁷

During a prolonged debate over the courts’ jurisdiction, Chairman Graybill offered a somewhat different opinion than an opinion offered by

238. *Id.*

239. *Id.*

240. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1033 (Verbatim Transcript).

241. *Id.*

242. *Id.* at vol. 4, 1032.

243. *Id.* at vol. 4, 1033.

244. *Id.* at vol. 4, 1035.

245. *Id.* at vol. 4, 1034–1035.

246. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1035–1053 (Verbatim Transcript).

247. *Id.* at vol. 4, 1053.

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Lawyer-Delegate Berg.²⁴⁸ Delegate Aasheim, a nonlawyer delegate, responded to this debate pointedly: “Mr. President, I’m going to wait until the legal fraternity gets their arguments settled, and then I’m going to ask mine.”²⁴⁹

Picking up on this comment, Lawyer-Delegate Schiltz stated: “Mr. Chairman, I am not sure that this little legal debate is getting across to the lay people in this group.”²⁵⁰ At that point in the proceeding on the Judicial Article, only six nonlawyer-delegates (Pemberton, Toole, Bowman, Heliker, Romney) had offered any comments or raised any questions.²⁵¹ Presumably the bellwethers were the lawyers on the two sides; but figuring out whom to follow was not so easy. Before the motion to recess could be made, Delegate Bugbee inquired: “Mr. Chairman, would it be possible for someone—one of the lawyers—to be assigned to interpret what the other lawyers have been saying after they’ve said it.”²⁵² The Chair replied: “Mrs. Bugbee . . . that would be an impossible task.”²⁵³

At the opening of the Convention on February 26, 1972, after a long recess, President Graybill delivered a stern and principled message to the delegates. He stated:

In the last few weeks, I have had to do battle on various occasions to accomplish the administrative needs of the Convention. And I speak today at the risk of having to do battle again. But I perceive it to be my duty to speak out if this Convention is in any danger of failing in its objectives. In my judgment, there is such a danger today.²⁵⁴

It was clear that President Graybill was both concerned and frustrated by the debate’s tenor and the lack of progress on the Judicial Article. He noted the Legislature had only appropriated enough money for 23 days of debate, of which eight had already been taken up, and the delegates had yet to consider eight articles and all of the Style and Drafting Committee’s reports. Graybill admonished that if the Judiciary Article were not completed on that day, there was a risk that the Convention could not reach its goal:²⁵⁵

We are not free, each of us, to write the Constitution as we, individually, might like. It would be impossible to have a Constitution which 100 of us, individually, liked. We must compromise. We must advance through the articles by choosing between the committee alternatives, not by inventing new

248. *Id.* at vol. 5, 1053.

249. *Id.* at vol. 4, 1055.

250. *Id.*

251. *Id.* at vol. 4, 1010–1055.

252. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 4, 1057 (Verbatim Transcript).

253. *Id.*

254. *Id.* at vol. 4, 1061.

255. *Id.* at vol. 4, 1062.

amendments in the heat of the debate. There will, of course, be exceptions. We must hope that they'll be few, or we cannot, complete our task in a timely and reasonable fashion. In summary, we must draft the Constitution for Montana's future, not for the election. The people will support us when we have shown intelligent leadership. And, secondly, we must make the Convention work. We must proceed faster and surer, and we must share the responsibility and compromise gracefully.²⁵⁶

Graybill then provided seven guidelines for the delegates to follow.²⁵⁷ He closed by saying:

[Y]esterday a good many of the members of the Judiciary Committee and some lawyers did work quite hard. And they are going to try and boil down and get themselves together and try and get the delegates to support either one or the other group of lawyers' viewpoints and try and get the Judicial Article accomplished today. Now, it can be accomplished today if we will follow one of the two or three main streams of argument that these lawyers have. But if we insist on each individually becoming lawyers today, it is going to be difficult to educate all of us to that level, if I may rebut, in that short time.²⁵⁸

Graybill's points were well-taken and effective in some respect, but as the rest of the proceedings on the Judicial Article reveal, its most controversial provisions were philosophical—not legal or technical. On the legal precepts, particularly those on which the lawyers agreed, the proceedings went smoothly with delegates deferring to the lawyers. But the lawyers' differing philosophies of government were diverse.

In the debate, Lawyer-Delegate Aronow noted the work done over the weekend by himself and Lawyer-Delegates Schiltz and Berg.²⁵⁹ He explained they had prepared amendments constituting a compromise in language and thought between the major and minority reports.²⁶⁰ Aronow said: "We are indeed deeply grateful to Jim Garlington, who acted as somewhat of a referee and helped us tremendously."²⁶¹ He went on to state: "We have some differences, and I might mention those to you. And those differences are not in language, they're not in draftsmanship, they're not in technical matters; but they are in principles involved in this matter."²⁶²

The differences noted by Aronow were: (1) whether the clerk of the Supreme Court should be elected or appointed; (2) the method of selecting judges of the district courts and the Supreme Court; (3) whether the county attorney and the method of selection should be mentioned in the Constitution or set by law; (4) whether the Constitution should retain the Justice of

256. *Id.*

257. *Id.*

258. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1062–1063 (Verbatim Transcript).

259. *Id.* at vol. 4, 1069.

260. *Id.*

261. *Id.*

262. *Id.*

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Peace courts; and (5) the rulemaking power of the Supreme Court.²⁶³ Delegate Aronow said: “We, as the ad hoc committee that met yesterday afternoon, could not get together on those items. So the principles involved will have to be decided—by the Convention.”²⁶⁴

Delegate Aronow indicated that the ad hoc committee’s proposal of specific amendments on some of the issues and outline of the particular issues on which they could not agree would be a good starting place for the day’s discussion.²⁶⁵ He stated: “[W]e should be able to get away from most of the wrangling that was started on Saturday.”²⁶⁶ Aronow then went on to frame what he considered the most important issue with respect to the selection of judges:

I would like to point out to you some general observations on the importance of the courts; and I would like to call to your attention that no matter what broad powers or rights you provide for people in the Bill of Rights, the value of those rights are dependent entirely on how the court interprets them. . . . [I]t is dreadfully important, in my view, at least, that the courts be made independent, be made strong, be made unafraid to act for fear of reprisal from one of the other branches of the government.²⁶⁷

The appropriate term-lengths for Supreme Court justices and district court judges were also contentious. Lawyer-Delegate Garlington’s proposal to increase the term-length of Supreme Court justices to eight years, and the term-length of district court judges to six years, was defeated on a 46–46 vote, with 10 lawyers in favor.²⁶⁸ On a motion to reconsider, Mr. Garlington’s proposal was approved by a vote of 49 to 48, with 11 lawyers voting in favor and 12 against.²⁶⁹

How to select the justices and judges was also controversial. Lawyer-Delegate Holland’s motion to have the election of judges remain essentially the same as under the 1889 Constitution failed on a vote of 47 in favor and 51 opposed, with 13 of the lawyers voting in favor and 10 against.²⁷⁰ It is not surprising, given the sharp divisions and the close votes—particularly among the lawyers—that Article VII, § 8 was something of a compromise and a disappointment to many. It provides:

(1) The governor shall nominate a replacement from nominees selected in the manner provided by law for any vacancy in the office of supreme court justice

263. *Id.*

264. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 4, 1069 (Verbatim Transcript).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at vol. 4, 1116–1117.

269. *Id.* at vol. 4, 1153–1154.

270. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 4, 1099 (Verbatim Transcript).

or district court judge. If the governor fails to nominate within thirty days after receipt of the nominees, the chief justice or acting chief justice shall make the nomination. Each nomination shall be confirmed by the senate, but a nomination made while the senate is not in session shall be effective as an appointment until the end of the next session. If the nomination is not confirmed, the office shall be vacant and another selection and nomination shall be made.

(2) If, at the first election after senate confirmation, and at the election before each succeeding term of office, any candidate other than the incumbent justice or district court judge files for election to that office, the name of the incumbent shall be placed on the ballot. If there is no election contest for the office, the name of the incumbent shall nevertheless be placed on the general election ballot to allow voters of the state or district to approve or reject him. If an incumbent is rejected, another selection and nomination shall be made.

(3) If an incumbent does not run, there shall be an election for the office.²⁷¹

This approach does little to ensure the independence of the judiciary, nor does it encourage the most qualified person to seek judicial office. It does create control over the judiciary by the voters, but it also means that judicial candidates have to be very concerned about raising money with which to campaign. Delegate Jean Bowman, who later became a lawyer herself, was very unhappy with the final version of the Judiciary Article and later wrote a law review article about what went wrong.²⁷²

Whether the Supreme Court should possess authority to issue writs of supervisory control was also strongly debated by the lawyers. A writ of supervisory control is a writ issued to correct an erroneous ruling made by a lower court either when there has been no appeal or when an appeal cannot provide adequate relief and the district court's ruling will result in gross injustice.²⁷³ Lawyer-Delegate Schiltz proposed removing the Court's general supervisory power: "I think that you will find that the district judges find themselves universally insulted by the use of the writ of supervisory control. It isn't used as carefully and sparingly as it used to be"²⁷⁴

Lawyer-Delegate Arness also spoke against the Montana Supreme Court having the writ of supervisory control, stating: "[T]he other states can get by and the lawyers there are able to make up their minds; we ought to be able to make up our minds just as well here and get along without this thing."²⁷⁵

Lawyer-Delegate Berg supported the Supreme Court's Writ of Supervisory Control, noting: "[T]he employment of such a writ, whether it's

271. Mont. Const. art. VII, § 8 (amended 1992).

272. Jean M. Bowman, *The Judicial Article: What Went Wrong?*, 51 Mont. L. Rev. 492 (1990).

273. *Black's Law Dictionary* 1751 (Bryan A. Garner ed., 9th ed. 2009).

274. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1039 (Verbatim Transcript).

275. *Id.*

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unique in Montana or not, has a fitting place within our jurisprudence. . . . It has not been used flagrantly, it has not been abused.”²⁷⁶

Lawyer-Delegate Cate also supported the writ of supervisory control, saying:

If you’ve got a lot of money—and money has a lot to do with lawsuits, you know—if you’ve got a lot of money, you don’t want the writ of supervisory control. But for the people, the little people, they need the writ of supervisory control because it’s a way to keep the judges honest and it’s a way to avoid having to go all the way through a trial and all the expenses of an appeal in order to get an issue decided.²⁷⁷

Ultimately, the Court’s supervisory power was retained in the 1972 Constitution, and the new article deleted the restrictive language of the 1889 Constitution.²⁷⁸ The 1889 Constitution provided that the Supreme Court shall have a general supervisory control over all inferior courts, under such regulations and limitations “as may be prescribed by law”; the quoted phrase was omitted from the current Montana Constitution.²⁷⁹

Another issue was what kind of rules, if any, the Supreme Court should be allowed to promulgate. Lawyer-Delegate Berg made the prevailing argument that the Montana Supreme Court should be able to make rules for the practice of law and judicial administration in all courts.²⁸⁰ Article VII, § 2(3) states: “[The Supreme Court] may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. . . .”

In the debate over the Court’s rulemaking authority, lawyer-delegates were again prominent. Lawyer-Delegate Schiltz stated that allowing for legislative disapproval of the Montana Rules of Civil Procedure was intended to prevent the Supreme Court from promulgating rules other than rules of practice and procedure.²⁸¹ Lawyer-Delegate Berg stated that the Supreme Court’s rulemaking power was not intended to include rules of evidence.²⁸² Lawyer-Delegate Cate opposed including in the Court’s rulemaking authority any rules concerning the admission and conduct of members of the bar; he felt it was dangerous for the Court to control the entire legal profession of the State of Montana.²⁸³ Cate worried it might

276. *Id.*

277. *Id.* at vol. 4, 1040.

278. Mont. Const. art. VII, § 2(2). See generally Larry Howell, *Purely the Creature of the Inventive Genius of the Court: State Ex Rel. Whiteside and the Creation and Evolution of the Montana Supreme Court’s Unique and Controversial Writ of Supervisory Control*, 69 Mont. L. Rev. 1 (2008).

279. Mont. Const. art. VIII, § 2 (superseded 1972 by Mont. Const. art. VII, § 2(2)).

280. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1021–1022 (Verbatim Transcript).

281. *Id.* at vol. 4, 1072.

282. *Id.* at vol. 4, 1021, 1037.

283. *Id.* at vol. 4, 1037–1038.

lead to the integration of the State Bar and that every lawyer would be required to be a member,²⁸⁴ which of course later happened.²⁸⁵

Another issue was the proposed creation of a Judicial Standards Commission. Lawyer-Delegate Aronow made the motion and argued for its creation.²⁸⁶ Lawyer-Delegate McNeil opposed it, but Delegate Berg supported it.²⁸⁷ The provision was approved with amendments as § 10 of Article VII.²⁸⁸

Lawyer-Delegate Arness spoke against a proposal allowing the Legislature to diminish the salaries of Montana Supreme Court justices during their term of office so as to maintain the independence of the judiciary.²⁸⁹ If the Legislature were allowed to lower the salaries of justices during their term of office, this could permit the Legislature to influence the justices in how they decided cases and wrote their opinions. Arness prevailed, as reflected by the language in the Constitution: "All justices and judges shall be paid as provided by law, but salaries shall not be diminished during terms of office."²⁹⁰

Whether to maintain justice courts in each county was also discussed. Montana is geographically large, with a small population, and district court judges do not reside in every county. During the Convention, there was an effort to eliminate the justice court, create a system of inferior court judges under the direct supervision of the district court judges, and require that inferior court judges be lawyers.²⁹¹ Lawyer-Delegate Ask argued that there should be a justice court judge in every county in Montana,²⁹² and the rural communities lobbied to preserve justice courts in every county so that their judges did not have to be lawyers.²⁹³ They prevailed; § 5(1) of Article VII provides for a justice court in each county.²⁹⁴

The majority report proposed state funding for the expenses of Supreme Court justices and district court judges in contested general elec-

284. *Id.* at vol. 4, 1038.

285. *Supreme Court Order Unifying the State Bar*, No. 12616 in the Supreme Court in the State of Montana (1973).

286. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1029–1030, 1122–1123 (Verbatim Transcript).

287. *Id.* at vol. 4, 1124–1125.

288. *Id.* at vol. 4, 1126–1127.

289. *Id.* at vol. 4, 993.

290. *Id.* at vol. 4, 991–993; Mont. Const. art. VII, § 7.

291. Elison & Snyder, *supra* n. 37, at 146; see the comments of Delegate Berg, *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1018–1020 (Verbatim Transcript); see also the comments of Delegate Campbell, *id.* at vol. 4, 1158.

292. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1141–1142 (Verbatim Transcript).

293. Elison & Snyder, *supra* n. 37, at 146; see Mont. Const. art. VII, § 5.

294. Mont. Const. art. VII, § 5(1).

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tions.²⁹⁵ This funding was proposed as § 15.²⁹⁶ In addition to providing funding for contested races for Supreme Court justices and district judges, § 15 provided that no candidate or any person on his or her behalf could exceed limits to be set by the Legislature.²⁹⁷ This provision was approved without much debate on a vote of 46 to 45.²⁹⁸ Lawyer-Delegate Schiltz commented: “[T]his is the most progressive thing that’s been in this body to date, and it’s going to come some day, and it ought to be in here right now.”²⁹⁹ However, later that day, after a successful motion to reconsider, a motion to delete § 15 was approved on a vote of 49 to 47.³⁰⁰

During the debate of the Style and Drafting Committee’s proposals for Article VII, substantive provisions were again considered. Delegate Schiltz moved to create § 14, providing for state funding of elections of Supreme Court justices, but not district court judges.³⁰¹

The Legislative Assembly shall appropriate funds for the contested general election campaign expenses of candidates for offices of justice of the Supreme Court and shall enact laws regulating the amount, expenditure and disposition thereof. No candidate for justice of the Supreme Court nor any person or persons on his or her behalf shall expend money in a campaign for the office in excess of the amount appropriated and authorized by the Legislative Assembly.³⁰²

Schiltz spoke fervently on behalf of his proposal: “I want to say that . . . nobody is indicting the Supreme Court. We’re concerned about how it looks to have the Supreme Court get the money from where it gets it.”³⁰³ On March 13, 1972, the delegates voted in favor of this provision, 55–32, with 15 lawyers in favor and 6 against.³⁰⁴ However, § 14 was reconsidered and in the final vote on March 16, proponents of § 14 outnumbered opponents just 49–48.³⁰⁵ Lacking a majority of 51 votes, the provision did not pass.³⁰⁶

Having experienced the Judiciary Article for some 38 years now, we can say that, for the most part, it has worked reasonably well. The compro-

295. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 508 (Committee Reports).

296. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1137 (Verbatim Transcript).

297. *Id.*

298. *Id.* at vol. 4, 1139.

299. *Id.* at vol. 4, 1165.

300. *Id.* at vol. 4, 1179.

301. *Id.* at vol. 6, 2191.

302. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 6, 2191 (Verbatim Transcript).

303. *Id.* at vol. 6, 2204.

304. *Id.* at vol. 6, 2204–2205.

305. *Id.* at vol. 7, 2452–2453.

306. *Id.* at vol. 7, 2453.

mise provision (§ 8) for the selection of justices and judges has worked. The eight-year terms for Supreme Court justices, six-year terms for district court judges, and four-year terms for justice court justices (§ 7) have been satisfactory. The retention of the justices of the peace (§ 5), who are not required to be lawyers, perhaps gives these justices a certain rapport with the people brought before them. It has seemed a good thing for the Supreme Court to have the rule-making authority (§ 2) because our highest court needs to provide leadership. The one problem the Convention delegates did not resolve was the financing of campaigns for judicial office. It is a serious problem that justices and judges have to campaign and raise funds to do so. It is demeaning and tends to politicize the process to an unwarranted degree. This is a problem that the Legislature can address at any time.

V. ARTICLE IX: ENVIRONMENT AND NATURAL RESOURCES

A. Introduction

The day after the Committee of the Whole considered the Judicial Article, it took under consideration the Natural Resources and Agricultural Committee's proposal to create a new Environment and Natural Resources Article—Article IX. At the beginning of the discussion, Lawyer-Delegate Felt, Chair of the Committee of the Whole, admonished the lawyers: "I might just mention that yesterday, since we dealt with the article on Judiciary, the lawyers were necessarily quite active, and I am sure that they probably have tired tonsils today; and that my glasses aren't going to function very well when the lawyers stand up today."³⁰⁷

Later, he asked Delegate Scanlin "to keep a score sheet, please, of the number of times that lawyers are recognized and rise."³⁰⁸ Chairman Felt continued: "And for these purposes, today, we will not count either Mr. McNeil or Mr. Brazier as attorneys, since they will be speaking as members of the committee. In the event that any of them speak longer than five minutes, put an asterisk after their names"³⁰⁹

After some bantering between Delegate Scanlin and the Chair about lawyers, Delegate Harper, a Methodist minister whose oratorical skills were on par with the best of the lawyers, rose to say:

Mr. Chairman, I just want to say I know, or least I hope, this is being done in fun, about the lawyers. I think we all recognize that we are dealing, under the Constitution, with a legal document—basic law. I just simply rise to say that

307. *Id.* at vol. 4, 1198.

308. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1201 (Verbatim Transcript).

309. *Id.*

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I have appreciated very much a good many of the comments that the lawyers have made. I am not familiar with law. The first thing I do in a law case is go to a lawyer, and I think most of the rest of us feel that way. So, I would like to just say that I don't share in the idea that the lawyers are any less members of this group and should be restricted in any way in their speaking, any more than any of the rest of us.³¹⁰

Chairman Felt's comments did not have much of a chilling effect, if any, on the lawyers' speaking. Nor should they have. What was at stake in this article was one of the most far-reaching and unique provisions of Montana's Constitution.

The Committee's majority proposal provided:

Section 1: *Protection and enhancement*. (1) The State of Montana and each person must maintain and enhance the environment of the state for present and future generations.

(2) The Legislature must provide for the administration and enforcement of this duty.

(3) The Legislature is directed to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedy to prevent unreasonable depletion of natural resource.³¹¹

In presenting the Committee proposal, Lawyer-Delegate McNeil claimed it was the strongest environmental section of any existing state constitution.³¹² The Chairman of the Committee, Louise Cross of Glendive, noted that she had "the dubious distinction of being the only committee Chairman who was not able to get out a minority report of [her] own wording."³¹³ Cross disagreed that the Committee was recommending the "strongest constitutional environmental section of any existing state constitution."³¹⁴

B. Article IX, § 1

The Natural Resources and Agricultural Committee was divided over § 1 of Article IX. One of the most debated phrases at the Convention was part of a proposed amendment to § 1(1). A nonlawyer, Delegate James, moved to include the words "clean and healthful" in front of the word "environment."³¹⁵ Speaking against the amendment, Delegate Kamhoot (who was not a lawyer) commented:

310. *Id.* at vol. 4, 1202.

311. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 2, 552 (Committee Proposals).

312. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 4, 1200 (Verbatim Transcript).

313. *Id.* at vol. 4, 1199.

314. *Id.*

315. *Id.* at vol. 4, 1202.

Many, many times, members of the committee, including myself, asked people what “healthful” meant. No one could define it. This was one of the reasons, as Delegate McNeil said, that we took it out—because no one knows what it is. The question came up many times, of course, about this social security for lawyers.³¹⁶

Lawyer-Delegates Campbell and Loendorf, and lawyer-to-be Delegate Robinson argued in favor of inserting the words “clean and healthful” in the section.³¹⁷ Delegate Campbell felt very strongly about this change:

I feel that the present section as presented by the committee [without the words “clean and healthful”], stating that the State of Montana will maintain an environment is absolutely worthless. What this says, in effect, instead of being the strongest in the nation, is that there is no type of standard whatsoever to define this environment. . . . It does not describe whether it is good environment, bad environment, polluted environment, or anything. . . . I think that “clean and healthful” is a positive step forward.³¹⁸

A roll-call vote was taken on the James amendment, and both lawyer-committee members who voted no on the amendment, Lawyer-Delegate Brazier and Lawyer-Delegate McNeil, rose to explain their votes. The question as they saw it was whether the section would be stronger with or without the words “clean and healthful.” McNeil said: “I am not voting against Mr. James’ amendment, but rather voting for what I believe to be the stronger statement.”³¹⁹ In response to a question from Delegate Rod Hanson (not a lawyer), Delegate McNeil stated: “The opinion of the majority of the committee is that maintaining and enhancing the environment of this state is the strongest constitutional statement we can make.”³²⁰

On the other hand, Brazier stated:

I feel that, although the language of Mr. James’ amendment is stronger, it properly belongs in the Legislature. And there’s going to come a time when there’s a big case against a big industry, and they’re going to bring in some doctors from Pittsburgh to testify that it’s a healthy environment back there, and our Supreme Court is going to set us back instead of forward. In other words, we’ll make more progress by leaving it out.³²¹

This conclusion does not seem to square with his opinion that the proposed language was stronger, but the vote was taken and the amendment failed with 40 voting yes and 44 voting no.³²² Only seven of the lawyers voted to insert the words “clean and healthful” (their so-called “social security”

316. *Id.* (emphasis added).

317. *Id.* at vol. 4, 1204, 1206–1208.

318. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 4, 1204 (Verbatim Transcript).

319. *Id.* at vol. 4, 1209.

320. *Id.*

321. *Id.*

322. *Id.* at vol. 4, 1210.

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plan).³²³ Afterward, Brazier offered an amendment adding the modifier “physical” to the word “environment.”³²⁴ This amendment was defeated.³²⁵

Lawyer-Delegate Cate then proposed a new § 1, which embodied the public-trust doctrine:

The state of Montana shall maintain and enhance a clean and healthful environment as a public trust. The sole beneficiary shall be the citizens of Montana, who shall have the duty to maintain and enhance the trust and the right to protect and enforce it by appropriate legal proceedings against the trustees.³²⁶

In introducing his proposal, Cate stated:

The public trust doctrine is nothing new. The public trust doctrine has been recognized by the United States Supreme Court since 1842. . . . All the state lands are in public trust; navigable streams are in public trust. . . . It's existed in England for 800 years. . . . It is not consistent to taking private property, as has been alleged. It is not a socialist system—that has been alleged. It's simply an effective means of protecting the environment and it is probably the only true and effective means of protecting the environment.”³²⁷

Lawyer-Delegate McNeil had earlier noted, when presenting the Committee Report, that the definition of a “public trust” was not very clear, even if it was an established doctrine:

The majority [of the Committee] felt it unnecessary to have the state hold in trust all land, including, of course, privately owned real property, for the benefit of all the people of the state in order to accomplish the protection of the environment. In addition, the majority felt it unwise to experiment by incorporating into the Constitution, a “public trust” which was not clearly defined to the committee—and of all the persons who testified before our committee, there were not two who used the same definition.³²⁸

Lawyer-Delegate Brazier also spoke fervently against the public-trust concept.³²⁹ Delegate Brazier stated there were two approaches to protecting the environment, the public-trust doctrine or reliance on the police power, which was, as he noted, “the way our government has worked since its inception.”³³⁰ Brazier emphasized the danger of the public-trust doctrine

323. *Id.* at vol. 4, 1209–1210.

324. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 4, 1211 (Verbatim Transcript).

325. *Id.* at vol. 4, 1213.

326. *Id.* at vol. 4, 1214.

327. *Id.*

328. *Id.* at vol. 4, 1201.

329. *Id.* at vol. 5, 1222–1226.

330. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1222 (Verbatim Transcript).

on all fronts, to be cautioned by Chairman Graybill that he had spoken 15 minutes.³³¹

Lawyer-Delegate Cate did not take kindly to Brazier's diatribe, responding: "I wish to thank Mr. Brazier for stating the company position."³³² In his closing speech, it was clear that Mr. Cate felt that someone had gotten to Mr. Brazier and perhaps other delegates as well:

I've sat here the last few days and watched, one by one, you people being taken out into the outer chambers and lobbied by the interests that are against the environment, and I can name you that have been lobbied. Well, it's time for us to decide who's running the State of Montana—the people who elected us here or the companies. It's that simple. . . . I really believe that we came here to do something for the environment. I really believe it, and I think that we have to rise above our selfish interests and vote for the environment to save it for future generations. . . . I urge you to support the public trust concept, which is nothing new—it's been around since 1842.³³³

Despite Delegate Cate's plea, the public-trust doctrine failed on a vote of 34 in favor, 58 against, with six lawyers (Campbell, Cate, Loendorf, McDonough, McKeon, Schiltz) voting in favor.³³⁴

Next came a proposal by Delegate Robinson that did not contain the public-trust language, but again included the concept of a "clean and healthful" environment.³³⁵ After lengthy debate, Robinson's proposal was also defeated 43-51, with seven lawyers (Brown, Campbell, Cate, Loendorf, McDonough, McKeon, Schiltz) voting in favor.³³⁶

Delegate Campbell next proposed to amend the first subsection of § 1 to read: "The State of Montana and each person must maintain and enhance a clean and healthful environment in the state for the enjoyment and protection of present and future generations."³³⁷

Before Delegate Campbell's proposal went to a vote, Lawyer-Delegate McNeil offered yet another rewording: "The State of Montana and each person must maintain and improve the Montana environment for present and future generations."³³⁸ McNeil's proposal was approved by a vote of 68-19.³³⁹

331. *Id.* at vol. 5, 1225. Rule 17 of the Constitutional Convention rules stated: "No delegate shall speak longer than ten minutes at any one time" *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 1, 10 (Rules: Montana Constitutional Convention).

332. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1226 (Verbatim Transcript).

333. *Id.* at vol. 5, 1227.

334. *Id.* at vol. 5, 1227-1228.

335. *Id.* at vol. 5, 1227-1229.

336. *Id.* at vol. 5, 1240-1241.

337. *Id.* at vol. 5, 1247.

338. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1247 (Verbatim Transcript).

339. *Id.* at vol. 5, 1249.

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Indefatigably, Delegate Campbell immediately moved to amend McNeil's substitute motion by inserting the words "clean and healthful" before "environment." Campbell made his point, tongue in cheek:

[Y]ou can go to your hometown and walk down the street and someone will come up to you and say, "What did you do about the environment, finally, in the Constitutional Convention?" You will have to look them in the eye . . . and say, "Yes, we the people in Montana at the Convention decided to have one." Now, what is he going to say? You decided to have an environment. Well, isn't that wonderful! We've already got an environment.³⁴⁰

Based in large part on Delegate Campbell's forceful arguments for inserting the words "clean and healthful," the Convention turned around on the same day they had twice voted against the insertion of "clean and healthful" and voted in favor of adding those key words by a vote of 49–38.³⁴¹ This time, nine lawyers (Arness, Ask, Berg, Campbell, Cate, Habedank, McDonough, McKeon, Schiltz) voted in favor.³⁴² The four youngest lawyers consistently voted in favor of including the words "clean and healthful."³⁴³ The youngest, Lawyer-Delegate McKeon, parted with a number of Butte-Anaconda lawyers on the insertion of these words, saying:

One salient fact forces me—compels me to go for the strongest environmental protection we can. My area, the Anaconda-Butte area, has a rate of lung cancer and emphysema which is twice that of the national average. These people who work in the mines and who work in the smelter cannot endure . . . unless their environment—the working environment is cleaned up for them. For this reason, I will support . . . any environmental proposal which I feel will give some aid to these poor working men who have spent their lives in the mines and the smelter.³⁴⁴

How, and by whom, that right should be enforced was as controversial as the inclusion of the words "clean and healthful." This was the topic of Article IX, § 1(2). Lawyer-Delegate Murray moved for the adoption of the Committee's proposal, which read: "The legislature must provide for the administration and enforcement of this duty."³⁴⁵

Delegate Cross immediately rose with a substitute motion. She proposed the following instead: "To meet the obligation set forth in Section 1, each Montana resident may take appropriate legal proceedings against any party, governmental or private, subject to reasonable limitation and regulations as the Legislative Assembly may provide by law."³⁴⁶ Cross noted that

340. *Id.* at vol. 5, 1246–1247.

341. *Id.* at vol. 5, 1250.

342. *Id.* at vol. 5, 1250 (Verbatim Transcript).

343. *Id.* at vol. 5, 1645.

344. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 5, 1236 (Verbatim Transcript).

345. *Id.* at vol. 5, 1251.

346. *Id.*

§ 1(2) as proposed by the Committee did not add anything positive in terms of environmental protection, and worse, that it could be construed to exclusively delegate to the Legislature the ability to provide redress, even to the exclusion of the courts.³⁴⁷ She also noted that subsection 3, which directed the Legislature “to provide adequate remedies for the protection of the environment[],” would give further weight to an argument that environmental matters were exclusively within the control of the Legislature.³⁴⁸ Cross emphasized that if the Constitution were so interpreted and the Legislature did not act, there would be no redress for environmental harms.³⁴⁹

Without much debate, a vote was taken and Cross’s amendment was defeated with 44, six of whom were lawyers, voting in favor, and 46 voting against.³⁵⁰

In her argument, Delegate Cross had raised the issue, albeit indirectly, of whether the right to a clean and healthful environment was self-executing or whether it was dependent on legislative action. After § 1(2) and 1(3) were approved, Delegate Cross proposed a fourth subsection that read: “To meet this obligation, each Montana resident may take appropriate legal proceedings against any party, governmental or private, subject to reasonable limitation and regulation as the Legislative Assembly may provide by law.”³⁵¹

Cross’s proposal essentially mirrored the minority report. Lawyer-Delegate Dahood stated: “What we have added to [§ 1(3)] is, in my judgment, self-executing with respect to an individual who personally is affected with respect to his health.”³⁵² But Delegate Dahood then continued as if he were cross-examining Delegate Cross, intending to show that she did not really have any idea of what she was unleashing with her proposal: “Now, Mrs. Cross, does your proposal provide that someone from the eastern part of the State of Montana may come to the western part of Montana and file a lawsuit contending that, the high-quality environment that’s discussed in the first three sections has in some way been endangered?”³⁵³

Delegate Cross responded that the phrase “‘subject to reasonable limitation and regulation’ would take care of that.”³⁵⁴

Delegate Dahood continued: “Now, are you not intending by this provision to provide that every citizen in the State of Montana has a right as a

347. *Id.*

348. *Id.*

349. *Id.* at vol. 5, 1236.

350. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1253 (Verbatim Transcript).

351. *Id.* at vol. 5, 1255.

352. *Id.* at vol. 5, 1645.

353. *Id.* at vol. 5, 1256–1257.

354. *Id.*

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party litigant to start litigation anywhere in the state if they think the environment might be endangered, in their opinion?"³⁵⁵

She answered to the effect that the "wisdom of the courts" would be applied to ameliorate any perceived problems.³⁵⁶

Delegate Dahood responded:

This is nothing more than the public trust theory. I tried to keep my vow not to speak during the course of this discussion, but I think we're reaching a point now where, by the process of attrition, those who support the private property right of a free society may be very close to casting a shadow upon those rights in the State of Montana. . . . You're all talking about a threat in Montana that is more fiction than fact. We have to raise a barrier against pollution And the environment that we have now is not going to become worse by any degree. It is going to improve. . . . This provision that is before you now that states a private citizen, anywhere in the State of Montana, has the right to sue any other private party is an absolute imposition upon the private right to hold and enjoy property in the State of Montana; and if you want to go ahead and pass something like that, then you're going to inscribe upon the history of this state that one day in March of 1972, in Convention Hall, when you were sent here by the people to protect their rights to life, liberty and property, you took away part of that right with respect to property.³⁵⁷

President Graybill asked Delegate Etchart to take the Chair of the Committee of the Whole so he could participate in this debate, or apparently offer some strong counterpoint to Delegate Dahood's forceful speech.³⁵⁸ Graybill acknowledged that Dahood was right about a great many things, but stated:

I think the issue is, as he has stated it, whether or not we wish to sustain property rights in our Constitution for its term or whether we want to enlarge human rights in our Constitution by this amendment. Now, the issue is—let's get the issue clearly out—the issue is, do we want to give people the right to sue for environmental damage to the entire environment. Now Mr. Dahood is absolutely right that at the present time, people cannot sue unless they can show damage. . . . Now the issue is—and this is a national issue—the issue is, should we enlarge the people's right to sue in the environmental case. The argument in favor of it is that the environment is, in fact, all of our environment and the damage, because it is slow—I could use the nasty legal word "insidious"—but in any event, the damage is slow and rising slowly, and no one individual, except those right in the immediate vicinity, can show an immediate damage, but clearly everyone can show a damage in the long run.³⁵⁹

355. *Id.*

356. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1256–1257. (Verbatim Transcript).

357. *Id.* at vol. 5, 1257–1258.

358. *Id.* at vol. 5, 1265.

359. *Id.*

Graybill then went on to state that the “parade of horrors” that Lawyer-Delegate Dahood had described was not correct because the Legislature could enact legislation to eliminate any of the problems. Graybill stated:

[T]here are plenty of ways to avoid the parade of horrors, all in the hands of the Legislature, all in the hands of the people. The problem is not the parade of horrors. The problem is whether you want to, here in Montana, because of our environment, grant a right to plaintiffs that is greater than we have granted before.³⁶⁰

Delegate Bowman from Billings responded: “Mr. Chairman, until Mr. Graybill spoke, I wasn’t sure I knew what Mr. Dahood said except that I knew he said it very well.”³⁶¹ Bowman, who became a lawyer after serving in the Convention, was very well able to hold her own against the lawyers, and she refuted several of Delegate Dahood’s comments, speaking in favor of Delegate Cross’s motion.³⁶² She said: “I think that none of us is intending to impose [upon] the private right to hold private property. What we’re trying to do is to decide what we’re going to do with the private property.”³⁶³

After a fairly protracted debate, the proposal that each Montana resident may take appropriate legal proceedings against any party, governmental or private, to enforce the right to a clean and healthful environment, subject to legislative enactments, failed on a vote of 44 to 54, with eight lawyers voting in favor.³⁶⁴ The four youngest lawyer delegates again voted in favor, joined by Lawyer-Delegates Brown, Graybill, and McDonough, and lawyers-to-be Robinson and Bowman.³⁶⁵

C. Article IX, § 2

There was no comparable provision in the 1889 Constitution to the proposed Article IX, § 2. The section was proposed in response to concerns about the impact of the strip mining of coal that was underway in the eastern part of the State. Section 2(1), as proposed by the Natural Resources and Agricultural Committee, provided:

All lands disturbed by the taking of natural resources must be reclaimed to as good a position or use as prior to the disturbance. The condition or use to

360. *Id.* at vol. 5, 1266.

361. *Id.*

362. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1266 (Verbatim Transcript).

363. *Id.*

364. *Id.* at vol. 5, 1270–1271.

365. *Id.*

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which the land is to be reclaimed and the method of enforcement of the reclamation must be established by the legislature.³⁶⁶

The Committee report said the responsibility of protecting and restoring the surface conditions of Montana's lands for unborn generations should not be left to the Legislature, but should instead be protected by the fundamental law of the Constitution.³⁶⁷ Lawyer-Delegate Ask opposed the provision, noting that such a reclamation requirement might drive a number of small coal mines in his district out of business.³⁶⁸ However, the fact that the Legislature would set the standards mollified him somewhat.³⁶⁹

On March 2, Lawyer-Delegate Cate made a motion to add the words "to a beneficial and productive use" to § 2(1) so that it would read: "All lands disturbed by the taking of natural resources shall be reclaimed *to a beneficial and productive use*."³⁷⁰ His motion passed by a vote of 63 to 27.³⁷¹ However, that same day, Delegate Joyce said the Anaconda Company had informed him the mines would close unless those last six words were removed;³⁷² the six words were deleted by a vote of 63–23.³⁷³

D. Article IX, § 3

The importance of water to Montanans was recognized in Article IX, § 3,³⁷⁴ and several of the lawyer-delegates' understanding of water rights was critical to the discussion and wording of this section. Lawyer-Delegate McNeil stated:

[The] committee feels that water and water rights are of crucial importance to the past history and future development of the State of Montana. For this reason, the committee feels justified in expanding the present constitutional section, which relates solely to the use of water, to include provisions for the protection of the waters of the state for use by its people.³⁷⁵

Article IX, § 3(1) reads: "All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed."³⁷⁶

366. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 2, 555–556 (Committee Proposals).

367. *Id.*

368. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1279–1280 (Verbatim Transcript).

369. *Id.* at vol. 4, 1292.

370. *Id.* at vol. 4, 1299 (emphasis added).

371. *Id.* at vol. 4, 1299–1300.

372. *Id.* at vol. 5, 1357 (Verbatim Transcript).

373. *Id.* at vol. 5, 1361–1362.

374. Deborah Beaumont Schmidt & Robert J. Thompson, *Montana Constitution and the Right to a Clean and Healthful Environment*, 51 Mont. L. Rev. 411, 419 (1990).

375. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1301 (Verbatim Transcript).

376. Mont. Const. art. IX, § 3(1).

Lawyer-Delegate Davis, the subsection's most passionate proponent, noted the purpose of this sentence was to preserve vested and existing water rights³⁷⁷ and "to protect Montana water, to make a strong statement that we own our water, and protect it for the future use of our state and our people from downstream appropriation."³⁷⁸ Donald MacIntyre, who was the Chief Legal Counsel of the Montana Department of Natural Resources and Conservation, wrote in 1988 that "[t]he potential loss of the right or of its value as a property right prompted Delegate Davis to act."³⁷⁹ MacIntyre also noted that the intent behind the provision appeared to assure that a water right would be recognized as having the same status and afforded the same protection as any generally recognized property right and that the new Constitution did not diminish the stature or validity of any existing claim to use water despite the lack of any existing centralized record or verification of the use of the water.³⁸⁰

Lawyer-Delegate Berg argued it would be erroneous to state that Montana owns the water without reference to the rights of the people to use it.³⁸¹ Berg feared that if the Constitution merely provided that the State owned the water, the State could negotiate for the water's sale.³⁸² However, if the State was the trustee of water for the people's use and benefit, it could not enter into negotiations for the sale of water without the consent and approval of its beneficiary, the people.³⁸³ As commentators have noted: "Berg emphasized that the phrase, 'for the use of its people' reinstated the theory under which water had always been administered in Montana because 'water rights are never owned; nobody owns water. All that you ever acquire is the right to the use of the water.'"³⁸⁴

Article IX, § 3(3), ended up as follows: "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."

Notably, Lawyer-Delegate Aronow expressed a fear that has indeed become the subject of litigation since the Constitution's adoption. Aronow

377. *Constitutional Convention*, supra n. 3, at vol. 5, 1301 (Verbatim Transcript).

378. *Id.* at vol. 5, 1309.

379. Donald Duncan MacIntyre, *The Adjudication of Montana's Waters—A Blueprint for Improving the Judicial Structure*, 49 Mont. L. Rev. 211, 220 (1988). Delegate Davis was legal counsel for Clark Canyon Water Supply Company and East Bench Irrigation District for over 16 years. *Montana Constitutional Convention Proceedings*, supra n. 3, at vol. 1, 40 (Delegate Information).

380. MacIntyre, supra n. 379, at 220.

381. *Montana Constitutional Convention Proceedings*, supra n. 3, at vol. 5, 1308 (Verbatim Transcript).

382. *Id.*

383. John E. Thorson et al., *Forging Public Rights in Montana's Waters*, 6 Pub. Land L. Rev. 1, 22–23 (1985).

384. *Id.* at 23.

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feared that if the Constitution declared that the water of the State belonged to the people, the people could not be kept from it, and they would assume they could cross private lands to reach the waters.³⁸⁵ He acknowledged that the people should have the right to use Montana's waters, and his interpretation of this right closely tracks the Supreme Court's subsequent interpretation of the right: "You can go up and down [a] stream all you want to. But the only thing is, you can't drive across the rancher's land willy-nilly in order to get to it. You can go along county roads or wherever there's access. And you certainly may boat. You may hike up and down that stream."³⁸⁶

As finally approved, Article XI, § 3 "guarantee[d] existing water rights; restate[d] that beneficial use of water is a public use; claim[ed] state ownership of water subject to private use and appropriation; and require[d] the creation of a centralized record system of all water rights."³⁸⁷ As Elison and Snyder noted in their history of the Montana Constitution, this section effectively "formed the legal foundation for future water right claims and placed administration, control, and regulation of water rights in the legislature."³⁸⁸

Article IX, § 3 integrates Montana's traditional water-right perspectives with concerns about preserving water for Montana's future: "Montana did not take strict control of its water rights until the 1972 Constitution."³⁸⁹

VI. CONCLUSION

The creation of a state's fundamental law—its Constitution—is a defining moment in the history of a state. The 100 delegates at the 1972 Constitutional Convention were perhaps the most influential Montanans of the twentieth century. Their legacy, our state Constitution, endures.

Lawyer-Delegate Kelleher moved that the proposed Constitution be offered to the voters in a special election on June 6, 1972.³⁹⁰ The Rules Committee, chaired by Delegate Murray, supported Kelleher's resolution.³⁹¹ The proposed election would be just 74 days after the delegates approved the Constitution on March 24, 1972. Kelleher's push for a short campaign season was shrewd because it gave opponents less time to organ-

385. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 5, 1304 (Verbatim Transcript).

386. *Id.* at vol. 5, 1305.

387. Elison & Snyder, *supra* n. 37, at 172.

388. *Id.*

389. *Id.*

390. *Montana Constitutional Convention Proceedings*, *supra* n. 3, at vol. 3, 333 (Verbatim Transcript).

391. *Id.* at vol. 3, 330.

ize. On February 5, 1972, he said: “We are getting very privileged attention in the TV and in the radio. Everybody in the state is talking about the Con Con. We have momentum. We have a full head of steam”³⁹² His motion passed that same day.³⁹³

How the Constitution would be presented to the voters was just as critical as the timing. Several issues were suggested as side-issues to be voted on separately from the overall Constitution. Lawyer-Delegate Ask was among the delegates who argued that gambling should be voted on as a side issue and not included in the Constitution itself.³⁹⁴ Lawyer-Delegate Brown argued in a similar vein.³⁹⁵ Delegate Brown also moved to have a separate vote on whether to have a unicameral or bicameral legislature.³⁹⁶ Lawyer-Delegate Campbell advocated a separate vote on the death penalty.³⁹⁷ Delegate Dahood agreed: “[P]lacing separate proposals on a ballot has a very useful function to perform. It generates interest in the constitutional issue.”³⁹⁸

These three issues all would have been controversial. Gambling specifically would have been controversial since it was not permitted under the 1889 Constitution, and those wanting to legalize gambling would have to vote for the new constitution if it were not presented as a separate ballot issue. As Lawyer-Delegate Habedank noted, Montana voters had not voted on the question of gambling since the 1889 Constitution’s adoption.³⁹⁹ The three side-issues—gambling, a unicameral or bicameral legislature, and the death penalty—were, in fact, voted on as separate issues and were not part of the vote on the actual Constitution itself. These were clearly wise moves, and no doubt helped win approval of the Constitution in what was to be a very close vote.

In the waning moments of the Convention, the delegates could look back on their work with a sense of pride. Delegate Garlington expressed the sentiment of most, if not all, the delegates in terms both eloquent and poignant:

Composed of people from every walk of life, amateurs one and all in basic constitutional doctrine, the delegates have become soundly expert in applying proper principles with perceptive judgment. We, as individuals, have been transformed from willing volunteers to dedicated and competent students of government Where we were partisan, we are nonpartisan. Where we

392. *Id.*

393. *Id.* at vol. 3, 345.

394. *Id.* at vol. 7, 2737–2738.

395. *Id.* at vol. 7, 2735–2736.

396. *Montana Constitutional Convention Proceedings, supra* n. 3, at vol. 7, 2966 (Verbatim Transcript).

397. *Id.* at vol. 5, 1814.

398. *Id.* at vol. 5, 1805.

399. *Id.* at vol. 7, 2745–2746.

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were inflexible, we are flexible. Where we were hesitant, we are confident. . . . Our debates and discussions have never been marred by angry exchange or sarcastic derision. . . . Suspicious of none, [our Constitution] expects the best of us all. . . . I think our Constitution is the finest gift to the young people of Montana that it is within our power to give. We are giving them the gift of participation in their present and the management of their future⁴⁰⁰

President Graybill affirmed the sentiment, stating in his final remarks:

The part you [the delegates] have played in the drafting of [the Constitution] will be written in the history of Montana. . . . [W]hen we first met in November, we were skeptical. We were novices, and we were unsure. . . . Now, by your efforts and your knowledge, we have enlightened and educated each other You have always gone ahead with the worthy goal of making Montana's government more responsible and more responsive to the people, both now and in the future. . . . Benjamin Franklin, who also participated in [a] convention, said of the work of the federal convention: "When a carpenter is making a table and wants to fit the boards together, he has to plane a little off from each edge." So, in this Constitution, each side would have to give way a little in order to fit together all the pieces of the new government. Here in the Montana Convention, this wisdom has been clearly shown. In the general spirit of compromise, our work has been completed. The Constitutional Convention has not been the work of any one man, nor has it been the work of the leading nine or ten men. It has truly been the work of all. Your ideas, your defense of your ideas have contributed, but so has your opposition to and your compromise with the ideas of others. And in the end, your acceptance of the counsel and thought of your fellow delegates has allowed us to generally agree on the principles we have included in our Constitution.⁴⁰¹

Clearly, the lawyer-delegates were not always correct in what they said. Nor did they think or act as a block. But their disagreement was to be expected, as the law is subject to various interpretations. Only on the nearly unanimous votes were the lawyers on the same side of the issue. They were as evenly divided on many issues as the rest of the delegates. As some of the votes demonstrated, the lawyer-delegates were more reluctant to change their minds than the Convention delegates as a whole. They were influenced by where they were from, their political philosophies, and the nature of their public service. Age—and maybe the idealism that accompanies youth—was the only significant identifiable pattern of voting among the lawyers. The four youngest lawyers voted together on nearly all controversial issues of the Convention, and they were joined in those votes by three of the delegates from the Convention, Jean Bowman, Mae Nan Robinson, and Robert Vermillion, who became lawyers after their Convention service.

The contributions of lawyers to the Convention were significant—crucial really—to the successful drafting of the Constitution. As Delegate

400. *Id.* at vol. 7, 3026–3027.

401. *Id.* at vol. 7, 3040.

Harper pointed out, the delegates' task was to write a legal document, and the lawyers' knowledge and advice was important to all the delegates in determining how the provisions should be framed and phrased; e.g., the "clean and healthful" environment and the "right to know" what our government is doing. The 24 lawyer-delegates played a crucial role in drafting one of the finest, if not the finest, state constitutions in the country.

APPENDIX A

TO

THE LAWYER DELEGATES OF THE 1972 MONTANA
CONSTITUTIONAL CONVENTION: THEIR INFLUENCE
AND IMPORTANCE

The Lawyer Delegates (alphabetically, with ages at time of Convention)

1. Franklin Arness, 30s (Libby; Democrat; University of Montana School of Law)
2. Cedor Aronow, 61 (Shelby; Democrat; University of Washington School of Law)
3. Thomas Ask, 46 (Roundup; Democrat; University of Montana School of Law)
4. Ben Berg, 56 (Bozeman; Republican; University of Montana School of Law)
5. Geoffrey Brazier, 42 (Helena; Democrat; University of Montana School of Law)
6. Bruce Brown, 50 (Miles City Independent, University of Montana School of Law)
7. Bob Campbell, 31 (Missoula; Democrat; University of Montana School of Law)
8. Jerome Cate, 32 (Billings; Democrat; University; University of Montana School of Law)
9. Wade Dahood, 42 (Anaconda, Republican, University of Montana Law School)
10. Carl Davis, 49 (Dillon; Democrat; University of Montana School of Law)
11. James Felt, 51 (Billings; Republican; University of Montana School of Law)
12. James Garlington, 63 (Missoula Republican, University of Montana School of Law)
13. Leo Graybill, 47 (Great Falls Democrat, University of Montana School of Law)
14. Otto Habedank, 54 (Sidney; Republican; LaSalle Extension University)
15. David Holland, 47 (Butte, Democrat, University of Montana Law School)
16. Thomas Joyce, 48 (Butte; Democrat; University of Montana School of Law)

17. Bob Kelleher, 48 (Billings; Democrat; American Catholic University School of Law)
18. James Loendorf, 32 (Helena, University of Montana School of Law)
19. Russell McDonough, 47 (Glendive; Democrat; George Washington University School of Law)
20. Mike McKeon, 25 (Anaconda; Democrat; University of Montana School of Law)
21. C. B. McNeil, 34 (Polson; Republican; University of Montana School of Law)
22. Marshall Murray, 39 (Kalispell; Republican; University of Montana School of Law)
23. John Schiltz, 52 (Billings; Democrat; University of Montana School of Law)
24. William Swanberg, 55 (Great Falls, Democrat; University of Montana School of Law)